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Supreme Court of the United States

OCTOBER TERM, 1994

THE CITY OF NEW ORLEANS, THE HUMAN RELATIONS COMMISSION AND EARL D. JACKSON, SR., IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE HUMAN RELATIONS COMMISSION
Petitioner

VERSUS

LOUISIANA DEBATING AND LITERARY ASSOCIATION, THE STRATFORD CLUB, THE BOSTON CLUB OF NEW ORLEANS AND THE PICKWICK CLUB
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
VOLUME I

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QUESTIONS PRESENTED FOR REVIEW

Whether the procedures established by the City of New Orleans pursuant to an anti-discrimination ordinance, modeled upon that upheld in a previous decision of this Court, for investigating complaints of discrimination and for determining the validity of claims of constitutional private club exemption from application of the ordinance, are unduly intrusive, so as to violate the First Amendment rights of a private nonexpressive association.

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OPINIONS ISSUED BY LOWER COURTS

The opinion of the U. S. Court of Appeals for the Fifth Circuit is reported at 42 F.3d 1483. It is set forth in the Appendix as item 1.

The opinion of the District Court for the Eastern District of Louisiana is unreported. It is set forth in the Appendix as item 2.

STATEMENT OF GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1), seeking review by writ of certiorari of the judgment of the U. S. Court of Appeals for the Fifth Circuit entered on January 26, 1995.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

U. S. Constitution, First Amendment

Chapter 40(C) of the Code of the City of New Orleans (App., item 3).

STATEMENT OF THE CASE

In 1991, the City of New Orleans adopted Chapter 40C of its Code, to eliminate and prevent discrimination in employment, places of public accommodation, resort or amusement, in housing accommodations and in commercial space because of race, creed, religion, color, sex, age, sexual orientation, national origin, ancestry or physicial condition or disability. App., Item 3.

This Chapter (the "Ordinance") was modeled on a similar New York City ordinance upheld against a facial attack by this Court in *New York State Club Ass'n, Inc. v. City of New York*, 487 U. S. 1, 108 S.Ct. 2225 (1988). Section 40C-101(2) of the Ordinance defines "public accommodation" as including any club which has more than 75 members, provides regular meal service, and regularly receives payment for dues, fees, use of space, facilities,

services, meals or beverages, directly or indirectly, either from or on behalf of nonmembers or members for or in the direct or indirect furtherance of trade or business or from or on behalf of any persons who claim such payment as a business expense for tax purposes.

Section 40C-101(3a) of the Ordinance expressly exempts from its definition of "public accommodation" any bona fide private club which does not meet this definition, and Section 40C-103 of the Ordinance provides that a club or institution is distinctively private in character and exempt from application of the Ordinance if it meets certain listed privacy characteristics, or if state or federal constitutional doctrines of privacy or freedom of association would require that the Ordinance not be applied against it.

The Ordinance established a Human Relations Commission (the "Commission"), which is charged with receiving and investigating complaints alleging violation of the Ordinance. Section 40C-53(a). Upon a complaint being filed, the Commission is to provide notice of the complaint to the respondent party and conduct a prompt investigation in order to make a probable cause determination. Section 40C-53(b).

The Commission may endeavor to resolve the matter through mediation and conciliation, under Section 40C-53(c)(1). As an alternative to, or concurrent with, the conciliation efforts, the Commission may hold a public hearing, conducted before a hearing officer designated by the Commission's Executive Director, pursuant to Section 40C-53(c)(2).

The Ordinance provides a registry procedure for entities to establish exemption as distinctly private in character, by submitting an application to the Executive Director, who then schedules a public hearing on the application, after notice is published. Section 40C-103(d). At the hearing, if the applicant proves, by a preponderance of the evidence, that it is a "distinctly private entity", the Executive Director will certify it as such. Section 40C-103(b). This certification is valid for three years; the entity must then repeat the process. Section 40C-103(a). Additionally, at anytime during this three-year period, the Executive Director, or any interested person, may initiate a complaint seeking to have the entity's distinctly private status revoked. Section 40C-103(f).

On December 31, 1992, the Commission received complaints of discrimination against each of the original plaintiffs in this action, the Louisiana Debating and Literary Association, the Stratford Club, the Boston Club of New Orleans and the Pickwick Club, (collectively "the Clubs"), alleging that each club had discriminated against him as a member of a racial minority by denying him access to apply for membership. By letter dated February 12, 1993, the Commission's Executive Director notified each of the Clubs of the complaint, requested a response from them, and advised them of possible options to resolve the complaint.

The Clubs did not respond to this notice letter. Instead, each Club filed an action pursuant to 42 U.S.C. Sect. 1983, invoking the original jurisdiction of the court under 28 U.S.C. Sections 1331 and 1343(3), seeking: (1) a declaratory judgment that the Ordinance does not apply to

them or, alternatively, that its application to them violates their federal constitutional right to privacy and freedom of association; (2) a permanent injunction prohibiting any investigation of them pursuant to the Ordinance; and, (3) a permanent injunction enjoining the application, or attempted application, of the Ordinance to them. The actions were consolidated, and the Clubs amended their complaints to add several state law claims. Shortly after the actions were filed, the City advised the district court that it would not refrain from proceeding with any investigation of the Clubs during the pendency of the litigation, without the need for a restraining order.

On March 10, 1994, the district court granted summary judgment in favor of the Clubs, concluding that they had

> demonstrated that [they are] private club[s] located at the most intimate end of the qualitative continuum of personal relationships. As such, [the Clubs] have a First Amendment right to enter into and maintain certain intimate human relationships without undue state intrusion and a right not to have their private affairs made public by the government. Moreover, [the Clubs] have established a substantial likelihood that [the City's] application of Chapter 40C to [the Clubs] would expose them to public revelation of their membership lists, their members' tax returns, and complete descriptions of all club activities, which would ultimately have a chilling effect on their members' First Amendment rights. App., Item 2, p. 29.

The court declared that Chapter 40C of the City's Code, as applied to the Clubs, violated their rights under the U. S. Constitution. The court enjoined the City from investigating any charges of discrimination against the Clubs and from applying, or attempting to apply, the Ordinance to the Clubs, because "...application of the ordinance to [the Clubs], including public hearings were private and sensitive information will be sought, coupled with the inevitable attendant publicity, would unduly burden [the Clubs'] First Amendment rights." App., Item 2, p. 29.

The City brought timely appeal from this judgment and, on January 26, 1995, the Fifth Circuit Court of Appeals affirmed the district court judgment.

ARGUMENT

This Court should allow a writ of certiorari under Rule 10.1 (C) of the Rules of the Court, because the decision sought to be reviewed decides important federal constitutional questions not previously addressed by the Court, involving the proper balance to be struck between First Amendment rights of nonexpressive private association and the competing public interest right of a municipal administrative body to inquire into the affairs of a group claiming protected status, in order to carry out the compelling state interest in preventing and eliminating invidious discrimination. Further, the decision in question appears to conflict with the principles set forth in the Court's opinion in *New York State Club Ass'n. v. New York City,* 487 U.S. 1, 108 S.Ct. 2225 (1988).

The ordinance in question here was modeled upon the New York ordinance upheld in that case, but this case involves as "as applied" attack on the ordinance. Because the New York Club Ass'n involved only a "facial attack" the Court did not address the questions raised here, regarding the permissible scope of inquiry and level of scrutiny permissible in applying such an ordinance.

The ordinance in question here employs procedures virtually identical to those of the New York ordinance described by this Court in *New York Club Ass'n.* 487 U.S. at 10. The courts below struck down the City's anti-discrimination ordinance as unconstitutional, not because the City sought to apply the anti-discrimination requirements of the ordinance to the Clubs or to regulate or control their membership policies, but because the administrative procedures of the City's Human Relations Commission failed to guarantee that the Clubs would not be required to make public disclosures of information regarding their "private affairs" in order to establish their constitutional "private association" status so as to be exempted from application of the ordinance.

The crux of the Fifth Circuit opinion is contained in its statement that..."if those clubs must 'go public' in order to remain private, then their privacy rights ring hollow indeed; "the flame is not worth the candle"." App., Item 1 at p. 40.

Such a statement presents a legal conundrum left unresolved by the Fifth Circuit. It is self-evident that these clubs must, in fact, "go public" in the sense of revealing information about their affairs, if they wish to establish their right to claim constitutional protection as a bar to the ap-

plication of anti-discrimination laws.

Indeed, the Clubs were required to make just such public disclosure in the district court proceeding itself, in order to demonstrate the significant characteristics of a private association which entitled them to constitutional protection.

The analysis undertaken by the Fifth Circuit in this opinion involved an extensive assessment of such information, including the Clubs' history, purposes, activities, membership criteria, admission processes, internal rules and by-laws, structual organization and number of members, leading to the conclusion that they were sufficiently "private" in nature to be entitled to "full constitutional protection" of their First Amendment rights of private association App., Item 1, at pp. 28-34.

Noting that the protection afforded by the First Amendment to rights of private association is not absolute, but is limited to protection against "unjustified government interference" (citing *Board of Directors of Rotary Int.'l Rotary Club of Duarte,* 481 U.S. 537 (1987), the court applied strict scrutiny analysis to the question whether the "infringement resulting from the investigation procedures provided by the Ordinance constituted an unjustified government interference with the Clubs' right to freedom of private association.

This analysis placed the burden on the City to justify its "infringement" by demonstrating that its action serves a compelling state interest which cannot be achieved "through means significantly less restrictive of one's associational rights." App., Item 1, at p. 35, citing *Dart v. Brown,* 717 F. 2d 1491 (5th Cir. 1983), *cert. den.,*

469 U. S. 825 (1984) and *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U. S. 707 (1981).

Conceding that the purpose for which the City's anti-discrimination ordinance was enacted constitutes a "compelling state interest," the court held that the City failed to meet its burden to show that its methods were the least intrusive means available to carry out this interest.

It is clear from the Fifth Circuit's discussion of Commission procedures, that the court would find *any* method of investigation "overly intrusive" if it included the potential for requiring any public inquiry or disclosure of information regarding the private affairs of these Clubs. See App., Item 1, at p. 37.

The court rejected the City's argument that the Ordinance provides not only a method by which private clubs may apply to be registered as such and thereby establish their right to be exempt from any investigation of complaints (Sect. 40C-103, App., Item 3), but also a procedure for incremental investigation by the Commissioner which includes (a) the opportunity for immediate informal resolution of a complaint through mediation and conciliation, (b) preliminary investigation by the commissioner to determine probable cause to believe that a violation of the ordinance had occurred (Sect. 40C-53) and (c) a provision for judicial review (Sect. 40C-54.).

The City contends that sufficient protection is provided through Commission procedures, guidelines and restrictions, as well as state statutory provisions, to

protect against any violation of the Clubs' private associational rights, asd that the requirement of disclosure of information similar to that which can be required under judicial precedures of federal courts does not constitute an inpermissible intrusion upon such privacy rights.

The Fifth Circuit's opinion acknowledged that, by coming into federal court, the Clubs necessarily accepted the requirement to make public disclosures of information regarding their private affairs, including information about their members. The court noted that it could be argued that this was the least intrusive method available to the Clubs for the vindication of their rights of private association (App. Item 1, at p. 39), but cited the additional protections available to the Clubs in federal court which were not available before the City Commission: they were before a neutral judge, not a Commission hearing officer, and disclosure of evidence in controlled in federal courts by evidentiray and procedural rules, whereas Commission hearings are not bound by strict rules of evidence. *Id.*

It is submitted that such reasoning carries an unwarranted implication that the City cannot be trusted to carry out its duties and conduct its procedures in a manner consistent with constitutional principles.

This judicial attitude conflicts with the approach taken by this Court in *New York State Club Assn. v. City of New York*, 487 U. S. 1, 108 S.Ct. 2225 (1988), in which Justice White made the following observation:

> Although the city's Human Rights Commission may not be empowered to consider the constitu-

> tionality of the statute under which it operates, under accepted legal principles it would be quite unusual if the Commission "could not construe its own statutory mandate in the light of federal constitutional principles." *Ohio Civil Rights Comm'n v. Dayton Christian Schools,* 477 U.S. 619 629 (1986). And even if this were also true, nothing in the Law purports to preclude judicial review of constitutional claims that may be raised on appeal from the administrative enforcement proceedings. [citations omitted]. These opportunities for individual associations to contest the constitutionality of the Law as it may be applied against them are adequate to assure that any overbreadth under the Law will be curable through case-by-case analysis of specific facts.
>
> 487 U. S. at 15.

Justice White also observed that the New York City Council had declared "that it did not purpose 'to interfere in club activities or subject club operations to scrutiny *beyond what is necessary in good faith to enforce the human rights law.*' 487 U. S. at 6 (emphasis added). This statement clearly implies that some degree of scrutiny would be necessary and constitutionally acceptible.

Justice O'Connor, in a concurring opinion in the same case, demonstrated a similar trust in a municipal commission's ability to safeguard constitutional rights through its administrative procedures, commenting as follows:

> An association or club thus is permitted to demonstrate that its particular characteristics

> qualify it for constitutional protection, despite the presence of the three factors specified in Local Law 63 [to determine whether a club is distinctly private" for application of its anti-discrimination laws]. *University Club v. City of New York*, 842 F.2d 37 41 (C.A.2 1988) (noting that the three factors in Local Law 63 are not 'the only ones relative to the constitutionality of applying the new definition to [a particular club]'). Moreover, such organizations are provided with an adequate opportunity to raise any constitutional claims in the administrative proceedings through which Local Law 63 is applied. (Text references omitted.) 487 U. S. at 19.

See also *Harrison v. NAACP*, 300 U.S. 167, 178 (1959), where the court held that federal courts should not adjudicate the constitutionality of state enactments which are fairly open to interpretation, until state courts have been afforded a reasonable opportunity to construe them, commenting, "And of course we shall not assume that the Virginia courts will not do their full duty in judging these statutes in light of state and federal constitutional requirements."

The only feature of the City's Ordinance which the courts below found to constitute such an unwarranted invasion of the Club's First Amendment rights as to render the entire City Code Chapter unconstitutional, as applied to the Clubs, was the potential risk of public exposure of information about their private affairs.

The Fifth Circuit agreed with the district court's statement that the Clubs have a First Amendment right

"not to have their private affairs made public by the government." App., Item 1, at p. 10. It is submitted, however, that the right not to disclose information about "private affairs" to public scrutiny is not itself a constitutional right, and that the right to shield such information from disclosure, if the face of legitimate government inquiry, deserves protection only to the degree that it may substantially impair the constitutional right of private association itself. For example, in *NAACP v. Alabama*, 357 U. S. 449, (1958), this Court held that Alabama could not compel the NAACP to provide its membership list to the State's Attorney General, but there the Court was considering the need for providing constitutional protection to a group engaged in advocacy of dissident views, as an expressive association, and was presented with "an uncontroverted showing [by the NAACP] that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of enjoyment, threat of physical coercion, and other manifestations of public hostility." 367 U. S. at 462. Cf. *Shelton v. Tucker*, 364 U.S. 479 (1960), in which the court struck down a law compelling teachers in public schools to file an annual affidavit listing all organizations to which they belonged to or contributed to for the previous five years, as a violation of their freedom of expressive association, on the basis that such protection was necessary to preserve the constitutional freedom to associate with unpopular or minority organizations.

Here, the associational right sought to be protected is the right to purely social private association, unrelated to any advocacy function. While the right to freedom of such nonexpressive social association has been recognized

as one protected under the First Amendment, it can hardly be said that the interest of such private social clubs in shielding from public disclosure information as to their activities and members carries the same weight as the interest of groups such as the NAACP in protecting such information.

It is notable that, in this case, the Clubs made no showing at all as to how their fear of any public disclosure requirements might adversely impact their right of private association, nor did the courts below articulate any basis for according "full constitutional protection" to the Clubs' right not to "go public," other than the fact that they *were* private clubs. The courts below treated the right of a private social club to protection against public disclosure about its affairs as synonymous with the right of private social association itself. The Fifth Circuit even felt moved to declare in its opinion that "liberty is at stake" here, evoking Patrick Henry's famous declaration, "...give me liberty or give me death!" App., Item 1, at p. 41, n. 34.

Consider, by contrast, the comment made in Note, "*State Power and Discrimination by Private Clubs: First Amendment Protection for Nonexpressive Associations*" 104 Harvard L. Rev. 1835, 1846 (1991):

> In the context of private club discrimination, it is particularly unlikely that the [U.S. Supreme] Court could feel secure in disabling the legislatures in the name of this country's history and traditions.

CONCLUSION

This Court's line of recent decisions dealing with similar important constitutional issues of First Amendment rights of private association and the permissible scope of government action in seeking to eliminate repugnant discriminatory practices, have sought to carefully shape the "delicate balance" between private and public interests so necessary to preserve our nation's cherished ideals and principles.

1 E.g., *New York State Club Ass'n v. City of New York,* 487 U.S. 1, 108 S.Ct. 2225 (1988); *Roberts v. United States Jaycees* 468 U. S. 609 (1984); *Board of Directors of Rotary Int'l. v. Rotary Club,* 481 U. S. 547 (1987); *Hishon v. King & Spaulding,* 467 U. S. 69 (1984).

The granting of a writ to review the Fifth Circuit decision in this case is particularly important in that endeavor. The questions left unanswered in *New York Club Ass'n.,* but presaged by the comments of Justices White and O'Connor quoted earlier, are now presented in an "as applied" attack upon a similar ordinance. If this decision is allowed to stand without review, its effect will be to cripple the ability of municipal government to act on behalf of its citizens to investigate charges of discrimination by a private associations, by cutting off its right to obtain information from such associations, and to permit public inquiry in order to determine its private status and the applicability of anti-discrimination laws. This decision leaves the City with no adequate means of assessing whether its ordinance is validly applicable to a particular entity.

It is suggested that such a result is unacceptable, in conflict with the balancing principles articulated by this Court in such private/government interest conflicts, and should be reviewed by this Court in the interest of further clarifying those principles.

Respectfully submitted:

BY: _____

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APPENDIX ITEM 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30180

LOUISIANA DEBATING AND
LITERARY ASSOCIATION,
for itself and on behalf of its members,
d/b/a The Louisiana Club,

Plaintiff-Appellee,

VERSUS

THE CITY OF NEW ORLEANS, ET AL.,

Defendants-Appellants.

****

STRATFORD CLUB,
for itself and on behalf of its members,

Plaintiff-Appellee,

VERSUS

THE CITY OF NEW ORLEANS, ET AL.,

Defendants-Appellants.

****

THE BOSTON CLUB OF NEW ORLEANS,

Plaintiff-Appellee,

VERSUS

THE CITY OF NEW ORLEANS, ET AL.,

Defendants-Appellants.

****

PICKWICK CLUB,
for itself and on behalf of its members,

Plaintiff-Appellee,

VERSUS

THE CITY OF NEW ORLEANS, ET AL.,

Defendants-Appellants.

****

JAN 26 1995

Appeal from the United States District Court
for the Eastern District of Louisiana

Before BARKSDALE and PARKER, Circuit Judges, and COBB[1], District Judge.

RHESA HAWKINS BARKSDALE, Circuit Judge:

At issue are whether the district court abused its discretion in not abstaining from hearing this challenge by

[1] District Judge of the Eastern District of Texas, sitting by designation.

four clubs against application to them of a newly enacted City of New Orleans ordinance prohibiting, *inter alia*, discrimination in places of public accommodation; and, absent an abuse of discretion, whether the clubs had private status of such a nature that such application, to include the ordinance's investigative and public hearing procedures, is violative of First Amendment "protect[ion] against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships" (right of private association). *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987).

Following notification of administrative complaints (discrimination charges) being filed against them, the four clubs, claiming private status, sought to enjoin the City from enforcing the ordinance against them. The district court granted summary judgment, to include injunctive relief, holding that the ordinance, as applied to the clubs, violated their constitutionally protected right of private association. We AFFIRM.

I.

In late 1991, "to eliminate and prevent discrimination", the City adopted Chapter 40C of its Code. Section 40C-50.[2] The Chapter was based on a similar New York

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[2] Section 40C-50 provides in part:

> In the City of New Orleans with its great cosmopolitan population consisting of large numbers of people of every race, color, creed, religion, age, physical condition, national origin and ancestry, many of them with disabilities, there is no greater danger to the health, morals, safety and welfare

City ordinance, which, in 1988, had withstood a facial challenge to its constitutionality. *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988). Among other things, the Chapter proscribes discrimination by entities that fall within the definition of a "public accommodation".[3] This term includes, *inter alia*, any club which has more than 75 members, "provides regular meal service", and

> regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages, directly or indirectly, either from or on behalf of

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(footnote 2 continued)

> of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of differences of race, color, sex, creed, religion, age, national origin or ancestry, or physicial condition or disability or sexual orientation. The Council hereby finds and declares that prejudice, intolerence, bigotry, and discrimination and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state. The New Orleans Human Relations Commission as created by Article I of this chapter is designated as an instrument of the city's power to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in housing accommodations and in commercial apace because of race, creed, religion, color, sex, age, sexual orientation, national origin, ancestry, or physicial condition or disability whenever such discrimination is prohibited by provisions of this chapter or other city law; and said commission is hereby designated as the local Human Rights Commission for this city and is given such jurisdiction and power for such purposes as is conferred upon or authorized to a local Human Rights Commission under applicable state law.

[3] Section 40C-102 prohibits discrimination by a public accommodation "because of race, color, creed, religion, natural origin, ancestry, or unreasonably, because of age, sex, sexual orientation, physical condition or disability."

> nonmembers or members for or in the direct or indirect furtherance of trade or business or from or on behalf of any persons who claim such payment as a business expense for tax purposes ....

Section 40C-101 (2).

As reflected in note 2, *supra*, the Chapter established the Human Relations Commission, which is charged with receiving and investigating complaints alleging violation of the Chapter.[4] Section 40C-53(a). Upon a complaint being filed, the Commission is to conduct a prompt investigation in order to make a probable cause determination. Section 40C-53(b). If the Commission finds probable cause, it may endeavor to eliminate the unlawful discriminatory practice through conciliation and persuasion. Section 40C-53 (c)(1). As an alternative to, or concurrent with, the conciliation efforts, and following a public hearing, the Commission may issue a cease and desist order. Section 40-C53 (c)(2)-(3). The hearing is conducted before a hearing officer designated by the Commission's Executive Director; rules of evidence are not applicable; and the case in support of the complaint is presented by the City's Department of Law or another representative designated by the Executive Director. Section 40C-53 (c) (2).

The Chapter exempts "distinctly private entities".

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[4] The Chapter permits a complaint to be filed by any person claiming to be aggrieved by an unlawful discriminatory act or other prohibited act; additionally, the Commission may initiate the complaint. Section 40C-53(a).

Section 40C-103.[5] Such entities are listed in a registry maintained by the Commission. To be so listed, an entity must submit an application to the Executive Director, who then schedules a public hearing on the application. Section 40C-103 (d). Prior to that hearing, the applicant must

---

[5] Section 40C-103 provides:

> A club or institution is distinctly private in character if either:
>
> (1) a. its services, accommodations, advantages, facilities, or privileges are not offered or available to the public or to a wide sector of the public exclusive of a class or classes discrimination against whom is prohibited by this article;
>
> b. it is not an agent of the state or its creatures, agencies or subdivisions, and its activities do not constitute state action;
>
> c. it does not advertise for or engage in general solicitation to attract potential customers, patrons, or members;
>
> d. it does not fulfill a vital community role affected with public interest;
>
> e. its activities are not subsidized directly or indirectly by public funds, nor does it otherwise receive governmental support;
>
> f. it does not exist or operate for commercial or business purposes;
>
> g. it generally denies its services, accommodations, advantages, and privileges and participation in its activities, meetings, and social functions to all but members and their guests;

publish notice of the application and of the hearing, *Id.* "[A]ny interested person" may appear at the hearing in

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(footnote 5 continued)

h. its membership is of moderate size, and it is not connected with a larger institution, club or accommodation that is a public accommodation;

i. its organizers had the intention of constituting a private institution, club, or accommodation;

j. its organizational structure has not been altered since passage of the Civil Rights Act of 1964 in an attempt to avoid the applicability of that act, or since the date of the effectiveness of this chapter, in an effort to avoid the applicability of this article;

k. its members have a nexus of common interest;

l. its membership policies include an element of exclusiveness based on one (1) or more criteria other than membership in a class against whom discrimination is prohibited by this article; and

m. it does not offer or constitute facilities, sponsor activities, or create an environment where business deals are often made and personal contacts valuable for business purposes, employment, and professional advancement are formed; or

(2) its character as an institution, club, or association is such that, under the constitutional doctrines of freedom of association (including expressive association) and privacy prevailing in the law at the time of the hearing, the Constitution of this state or of the United States requires that Section 40C-102 [("Unlawful practices")] not be applied against it.

support of, or opposition to, the application. *Id.* If the applicant proves, by a preponderance of the evidence, that it is a "distinctly private entity", the Executive Director will certify it as such. Section 40C-103 (b). This certification is valid for three years; the entity must then repeat the proces. Section 40C-103(a). Additionally, at anytime during this three-year period, the Executive Director, or any interested person, may initiate a complaint seeking to have the entity's distinctly private status revoked. Section 40C-103 (f).

On December 31, 1992, a resident of California filed four complaints with the Commission, alleging that, in 1992, four clubs located in the City had discriminated against him in his attempts to gain membership: the Louisiana Debating and Literary Association, the Stratford Club, the Boston Club of New Orleans, and the Pickwick Club (the Clubs).[6] By letter dated February 12, 1993, the Commission's Executive Director notified the Clubs of the Complaint, requested information from them, and advised them of possible options to resolve the complaint.

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[6] The complaint made the following charge of discrimination:

> On July 16, 1992, and December 28, 1992, [the complaint] contacted several private clubs in New Orleans, Louisiana, in regards to obtaining membership. [The complaint] explained to them that he was a black man, and owned his own business in Los Angeles and San Francisco, California [,] and that he was going to be opening up a new business here in Louisiana. He further explained that he was financially capable of becoming part of their organization and requested an application and membership information. [The complainant] indicated that each organization that he contacted refused to send him an application or to provide any relevant information with respect to their membership criteria.

Approximately two weeks later, rather than responding to the letter, each club filed a separate action, pursuant to 42 U.S.C. § 1983, seeking: (1) a declaratory judgment that the Chapter does not apply to them or, alternatively, that its application to them violates their federal constitutional right to privacy and freedom of association; (2) a permanent injunction prohibiting any investigation of them pursuant to the Chapter; and, (3) a permanent injunction enjoining the application, or attempted application, of the Chapter to them.[7] The actions were consolidated, and the Clubs amended their complaints to add several state law claims. Shortly after the actions were filed, the City advised the district court that it would not proceed with any investigation of the Clubs during the pendency of the litigation.

The City moved, in July 1993, to have the complaints dismissed for failure to state a claim or, in the alternative, to have the district court abstain from exercising jurisdiction based upon *Younger* and *Pullman* abstention doctrines. Upon denial of the motion that September, the City petitioned this court unsuccessfully for a writ of mandamus or prohibition.

Following extensive discovery, the Clubs sought summary judgment. The district court concluded, after a lengthy analysis, that the Clubs had

> demonstrated that [they are] private club]s] located at the most intimate end of the qualitative continuum of personal relationships.

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[7] The defendants were the City, the Commission, and its Executive Director, in his official capacity (collectively, "the City").

> As such, [the Clubs] have a First Amendment right to enter into and maintain certain intimate human relationships without undue state intrusion and a right not to have their private affairs made public by the government. Moreover, [the Clubs] have established a substantial likelihood that [the City's] application of Chapter 40C to [the Clubs] would expose them to public revelation of their membership lists, their members' tax returns, and complete descriptions of all club activities, which would ultimately have a chilling effect on their members' First Amendment rights.

Accordingly, the court enjoined the City from investigating, pursuant to the Chapter, any charges of discrimination against the Clubs; it also enjoined the City from applying, or attempting to apply, the Chapter to the Clubs, because the inevitable attendant publicity, including public hearings for which private and sensitive information could be sought, would burden unduly the Clubs' and their members' First Amendment rights. The court retained jurisdiction.

II.

When all is said and done, the City claims primarily that the Clubs are not private, and are therefore subject to aplication of the Chapter, because, notwithstanding their private trappings, long history, and exclusivity, they control and dominate business in the City; that, despite undisputed evidence to the contrary, the Clubs' business is business. But, before reaching whether the Clubs are private, and if so, whether investigation of them pursuant

to the administrative complaints threatens unduly their constitutionally protected right of private association, we must deal with equally important issues of standing and abstention. All of these issues are but shorthand for this classic confrontation of competing governmental interests and individual rights; interests and rights that bring into play "our Federalism" on the one hand, and federal courts' protection of constitutional rights on the other; a balancing of governmental interests and individual rights that reflects the majesty and scope of our living Constitution.

A.

The City contends that the Clubs fail to state any injury or threatened injury that would entitle them to relief under § 1983; and that, therefore, the complaints should have been dismissed for failure to state a claim. But, in essence, the City is asserting lack of standing, a jurisdictional issue subject to plenary review. *E.g., Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 350 (5th Cir. 1989) (failure to allege injury raises standing, not failure to state a claim); *see, e.g., 7547 Corp. v. Parker & Parsley Dev. Partners*, 38 F.3d 211, 217 (5th Cir. 1994) (standing raises jurisdictional issue); *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758,760 (5th Cir. 1994) (jurisdiction subject to plenary review).

In *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988), the Supreme Court rejected a similar contention. Immediately after New York City adopted the ordinance upon which the Chapter is based, a consortium of clubs and associations sought a declaratory judgment that the ordinance was facially unconstitutional.

Despite no evidence of any enforcement or threatened enforcement, the Court ruled that the clubs "would have standing to bring this same suit on behalf of their own individual members, since those individuals 'are suffering immediate or threatened injury' to their associational rights as a result of the [ordinance's] enactment." *Id.* at 9-10 *(quoting Warth v. Seldin,* 422 U.S. 490, 511 (1975)); *see also City of Los Angeles v. Lyons,* 461 U.S. 95, 105 (1983) (standing to seek injunction depends on whether the plaintiff is "likely to suffer future injury"); *Steffel v. Thompson,* 415 U.S. 452 (1974) (declaratory relief not precluded when official threatens prosecution under state statute forbidding handbilling).

Here, not only has the Chapter been enacted, but complaints (discrimination charges) have been filed with the Commission; and it has put the Clubs on notice. Thus, the threat to the Clubs' and their members' associational rights is significantly greater than that faced in *New York State Club Ass'n.* This notwithstanding, the City maintains that no threatened harm exists because, if the Clubs can prove that they are protected by (fall within) the Chapter's "distinctly private entity" exemption, they would not be subject to any further regulation or threat to their constitutional rights.

But, under attack are the Commission's procedures and the investigation necessary to resolve, not only whether the Clubs are distinctly private entities" under the Chapter, but also, the complaints filed against each. Furthermore, by requiring a triennial repetition of the exemption process, as well as permitting any individual to challenge the exemption during this period, the Clubs face

the threat of further and potentially continual regulation by the City.

In sum, the filing with the Commission of discrimination charges pursuant to the Chapter presents the Clubs with a real and immediate threat to their associational rights. Accordingly, they have standing to challenge the Chapter.

B.

It goes without saying that abstention, under either the *Younger* or *Pullman* doctrines, is the exception. Accordingly, even if we determine that the preconditions for abstention have been met, we still review a district court's decision not to abstain only for abuse of discretion. *E.g., American Bank & Trust Co. of Opelousas v. Dent*, 982 F.2d 917, 922 (5th Cir. 1993).

1.

Abstention under *Younger v. Harris*, 401 U.S. 37 (1971), "is generally deemed appropriate [when] assumption of jurisdiction by a federal court would interfere with pending state proceedings, whether of a criminal, civil, or even administrative character." *Word of Faith World Outreach Center Church, Inc. v. Morales*, 986 F.2d 962, 966 (5th Cir.), *cert. denied*, ____U.S.____, 114 S. Ct. 82 (1993).[8]

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[8] One of the more vital considerations underlying the doctrine is

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare

> *Younger* abstention can be applied to "state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings, the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." *Ohio Civil Rights [Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 627 (1986)]. We thus must answer three relevant questions: (1) whether the state proceedings "constitute an ongoing state judicial proceeding;" (2) whether the proceedings "implicate important state interests;" and (3) whether there is "an adequate opportunity in the state proceedings toraise constitutional challenges." *Middlesex [County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)].

New Orleans Pub. Serv., Inc. v. City of New Orleans, 798 F.2d 858, 863-64 (5th Cir. 1986), cert. denied, 481 U.S. 1023 (1987).

The first of the three factors springs from the obvious point that "[w]hen no state proceedings are pending, a federal action does not interfere with or insult state pro-

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(footnote 8 continued)

> best if the States and their institutions are left free to perform their separate functions in their separate ways.... What the concept does represent is a system in which there is sensitivity to the ligitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger, 401 U.S. at 44.

cesses and 'the policies on which the *Younger* doctrine is premised "have little force...." ' " *Thomas v. Texas State Bd. of Medical Examiners*, 807 F.2d 453, 457 (5th Cir. 1987) (quoting Concerned Citizens of Vicksburg v. Sills, 567 F.2d 646, 650 (5th Cir. 1978) (quoting *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509 (1972))).. As noted, for *Younger* abstention, state proceedings must be ongoing and "judicial in nature". *See New Orleans Pub. Serv.*, 798 F.2d at 863-64; *Middlesex*, 457 U.S. at 432.

The district court ruled that *Younger* abstention was inappropriate because there was no ongoing state proceeding. The City does not attempt to controvert the "no ongoing proceeding" ruling. As a general rule, issues not presented adequately in a brief are deemed abandoned. *E.g., United States v. Ballard*, 779 F.2d 287, 295 (5th Cir.), *cert. denied*, 475 U.S. 1109 (1986); Fed. R. App. P. 28(a)(6) (brief must "contain the contentions of the appellant on the issues presented"). But, because *Younger* abstention was raised in district court and briefed partially here, we will consider it.

Subsequent to the complaints being filed with the Commission against the Clubs at the end of 1992, the only administrative activity has been the February 1993 letters to the Clubs. In fact, as noted, only a few days after this action was filed, the City advised the district court that it would not proceed with an investigation while this action was pending. Therefore, at issue is whether the complaint with the Commission and its notification letter "constitute and ongoing state judicial proceeding", *Middlesex*, 457 U.S. at 432, so as to satisfy the first prong of *Younger* abstention.

In *Dayton Christian Schools* and *Middlesex*, the Supreme Court held that the district courts should have abstained based on *Younger*. Unlike the present action, however, the regulating agencies in those cases had investigated the allegations, made determinations that probable cause existed, and served formal charges on the entities. *Dayton Christian Schs.*, 477 U.S. at 623-24; *Middlesex*, 457 U.S. at 428. In short, the state action had progressed significantly beyond that here.

We are confronted with a scenario closer to *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990). Following the filing of a complaint alleging prohibited conduct, and the commencement of an investigation, a state agency notified Telco, by letter, of the claimed violations and invited it to attend an informal factfinding conference. Following attendance at the conference, Telco sought federal court protection against further action by the state agency. *Id.* at 1227. In rejecting the agency's contention that the letter to Telco constituted the start of administrative proceedings, the Fourth Circuit

> decline[d] to hold that *Younger* abstention is required whenever a state bureaucracy has initiated contact with a putative federal plaintiff. Where no formal enforcement action has been undertaken, any disruption of state process will be slight.... We hold, therefore, that the period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time for a litigant to bring its First Amendment challenges in federal court. Indeed, if

> this time is never appropriate, any opportunity for federal adjudication of federal rights will be lost.

Id. at 1229 (footnote omitted).[9] The City's contact with the Clubs has not progressed even as far as that in *Telco*.

We need not determine whether there was an ongoing state proceeding. As noted, we review a decision not to abstain only for abuse of discretion. As reflected above, the district court's ruling that there was no ongoing proceeding does not constitute an abuse of that discretion, especially in light of the fact that the City has not sought to controvert that ruling. Therefore, we need not proceed further in considering *Younger* abstention.

2.

Alternatively, under *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941), "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). "*Pullman* abstention ... is addressed to the inappropriateness of federal court resolution of difficult or unsettled questions of state law and the undesirability of reaching constitutional questions that might be mooted by the application of state law." *Word of Faith*, 986 F.2d at 967.

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[9] Distinguishing between informal and formal proceedings, based on Virginia commonwealth law, the Fourth Circuit held also that the fact-finding conference was not "judicial in nature", an issue we need not address.

As noted, "[t]he abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers." *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). More accurately, as also noted, abstention is the exception, not the rule. *Nissan Motor Corp. in U.S.A. v. Harding*, 739 F.2d 1005, 1008 (5th Cir. 1984). Thus, our court has recognized that

> the extraordinary decision to stay federal adjudication requires more than an ambiguity in state law and a likelihood of avoiding constitutional adjudication. A district court must carefully assess the totality of circumstances presented by a particular case. This requires a broad inquiry which should include consideration of the rights at stake and the costs of delay pending state court adjudication.

Duncan v. Poythress, 657 F.2d 691, 697 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012 (1982).[10]

The City asserts that this case involves questions of state and local law which have never been adjudicated by a state court. Although the City acknowledges that this alone does not warrant *Pullman* abstention, it suggests

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[10] In rejecting *Pullman* abstention, the district court relied on three bases: (1) the Commission's proceedings did not provide the Clubs with an obvious method for securing a definitive ruling that could be pursued with full protection of their constitutional claims; (2) *Pullman* abstention is generally inappropriate where First Amendment or fundamental rights are at issue; and, (3) *Pullman* abstention turns on the existence of an ambiguous issue of state law, but neither party had demonstrated that the Chapter is ambiguous.

abstention is still appropriate, by intimating that the Chapter is susceptible to an interpretation other than its plain meaning. Such a proposition defies one of the traditional principles of statutory interpretation, *viz.*, courts must first look at the plain meaning of a statute's language. Furthermore, *Pullman* abstentsion

> contemplates that deference to state court adjudication only be made where the issue of state law is uncertain. If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction.

Harman v. Forssenius, 380 U.S. 528, 534-35 (1965); *Accord City of Houston Tex. v. Hill*, 482 U.S. 451, 469 (1987) ("[W]hen a statute is not ambiguous, there is no need to abstain even if state courts have never interpreted the statute."). The City has failed to identify, and we fail to find, any ambiguity in the Chapter which would support, let alone demand, abstention.

The City's second basis for *Pullman* abstention is that the Clubs raise state constitutional claims mirroring the federal constitutional rights claimed abridged.[11] The only time that a state constitutional provision may warrant

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[11] Because the district court found a First Amendment violation, it did not rule on the state law claims.

abstention is when that constitutional provision is so interrelated with the statute or ordinance at issue that it can be said state law is ambiguous. *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 598 (1976); *Pollard v. Cockrell*, 578 F.2d 1002, 1010 (5th Cir. 1978). As the Supreme Court noted, "to hold that abstention is required because [an ordinance] might conflict with ... broad and sweeping [state] constitutional provisions, would convert abstention from an exception into a general rule." *Flores de Otero*, 426 U.S. at 598.

Finally, the City maintains that if the district court were to abstain, the Clubs' constitutional rights would not be infringed or suspended while their privacy claims are asserted in an administrative hearing. But, again, it is the Commission's very procedures and investigation which are at the heart of the threat to the Clubs' associational rights. *See Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1032 (5th Cir. 1981) ("in view of the high cost of abstention in the context of suits seeking review of statutes exerting a purported chilling effect on First Amendment rights, ... we cannot say that [the] district court abused its discretion in declining to invoke *Pullman* abstention"), *cert. denied*, 455 U.S. 913 (1982).[12]

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[12] Although *Red Bluff* involved a facial challenge to a statute, the court's recognition that abstention may result in a high cost to First Amendment rights is applicable in this case, despite being an as-applied challenge. As discussed, *infra*, the Commission's investigative powers and procedures strike at the heart and soul of the Clubs' and their members' associational rights. If the district court were to stay its hand while the City violates that which the Constitution protects, then the Clubs' and their members' First Amendment freedoms would be for naught. Furthermore, as discussed, other factors contributed to the district court's decision not to abstain.

In sum, the district court did not abuse its discretion in declining to abstain.[13] Therefore, we turn to the merits.

C.

The critical substantive issues are whether the Clubs are private entities protected by the First Amendment; and, if so, whether the Chapter's procedures interfere impermissibly with that protection. But, first, we must consider whether the Clubs' challenge to the Chapter is facial or as-applied.

1.

The Clubs maintain they are challenging the Chapter only as applied to them. The City counters that, in reality, it is a facial attack, requiring, therefore, that the Clubs demonstrate either (1) that the Chapter could never be applied in a valid manner, or (2) that, although it may be applied validly against the Clubs and others, the Chapter is so broad that it may inhibit the constitutionally protected rights of third parties. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984).

Although the City states correctly the standard applied in facial challenges, it misconstrues the relief the Clubs seek, the gist of their arguments, and the supporting evidence. *See Bowen v. Kendrick*, 487 U.S. 589, 627-28 (1988) (Blackmun, J., dissenting). The Clubs contend that, based on their unique attributes, application of the Chapter

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[13] Of interest, as noted, the City waited almost five months after the Clubs filed suit to raise abstention.

would impermissibly interfere with their associational and privacy rights; they do not claim that the ordinance is incapable of being applied to any other entity or individual. Thus, we are faced with an as-applied challenge. *See Moore v. City of Kilgore, Tex.*, 877 F.2d 364, 390 (5th Cir.) (court will not consider a facial challenge to a regulation when plaintiff has succeeded in an as-applied challenge and when he failed to assert the rights of third parties), *cert. denied*, 493 U.S. 1003 (1989).[14]

2.

On three occasions during the 1980s, the Supreme Court addressed the extent to which the Constitution protects the associational freedom of private clubs. *New York State Club Ass'n.*, 487 U.S. 1 (1988); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). These cases provide that the Constitution protects two types of associational freedom:

> First, the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships. Second, the Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities.

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[14] In addition, we note the obvious: the Clubs have been identified through a discrimination charge as potential violators of the Chapter and have been so informed. Although the formal mechanism of the Commission's investigation has not been initiated, it would be just a matter of time before at least some, if not all, of the procedures went into play.

Rotary Club, 481 U.S. at 544. This appeal implicates the former — private association.[15]

The right of private association protects the choice of individuals and organizations "to enter into and maintain certain intimate human relationships ... against undue intrusion by the State ...." *Roberts*, 468 U.S. at 617-18. "Determining the limits of state authority over an individual's freedom to enter into a particular association ... unavoidably entails a careful assessment of where that

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[15] Because this case concerns clubs, we use the term "private association" to refer to the above referenced constitutional "protect[ion] against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships." *Rotary Club*, 481 U.S. at 544. For this protection, the term "intimate association" is sometimes used by courts; but, that term seems better suited for relationships, such as marriage, of a more intimate nature than those formed or forged in a private club.

In any event, and far more importantly, the Court acknowledged in *Roberts* that, to secure individual liberty, the formation and preservation of highly personal relationships must be protected against unjustified state interference. It then noted that the constitutional protection "afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference ... safeguards the ability independently to define one's indentity that is central to any concept of liberty." *Roberts*, 468 U.S. at 619. Other private relationships indentified by the Court as exemplifying these considerations, and thus being entitled to constitutional protection, included marriage, childbirth, the raising and education of children, and cohabitation with one's relatives. *Id.* at 619. But, the Court did not limit constitutional protection to familial situations; it recognized simply that these relationships possess those qualities which "are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty." *Id.* at 620. Based on an appreciation of this, the Court developed the factors, discussed *infra*, utilized in determining the extent to which an association is entitled to constitutional protection.

relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Id.* at 620. In determining whether a particular association is sufficiently private to warrant constitutional protection, as well as the scope of that protection, the Court has considered several factors, including: (1) the organization's size; (2) its purposes; (3) the selectivity in choosing its members; (4) the congeniality among its members; (5) whether others are excluded from critical aspects of the relationship; and, (6) other characteristics that in a particular case may be pertinent.[16] *Rotary Club*, 481 U.S. at 546; *Roberts*, 468 U.S. at 620.

Pursuant to our well-known standard of review for summary judgments, we conduct a *de novo* review of the summary judgment record to determine whether there is a genuine issue of material fact, and if there is none, whether the Clubs are entitled to judgment as a matter of law. *E.g.*, Fed. R. Civ. P. 56; *D.E.W., Inc. v. Local 93, Laborers' Int'l Union of N. Am.*, 957 F.2d 196, 199 (5th Cir. 1992). The City contests two rulings on the merits by the district court: that the Clubs have private club status; and, that the Chapter, as applied, violates their constitutional rights.

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[16] Whether an organization is a private club arises more often in cases dealing with Title II of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000a (barring discrimination in places of public accommodation). In those cases, courts have examined other factors to determine whether Title II's private club exception applies. The other factors include: (1) the history of the organization; (2) the use of facilities by nonmembers; (3) whether the club advertises for members; and, (4) whether the club is nonprofit or for profit. *Welsh v. Boy Scouts of Am.*, 993 F.3d 1267, 1276 (7th Cir. 1993). These additional factors may fall into the "other characteristics" category in considering an assertion of constitutional private association freedom.

Only to the extent that it challenges the private club status ruling does the City contest the district court's subsequent conclusion that the Clubs "are entitled to the fullest protection" of the First Amendment.[17] To do otherwise would run contrary to section 40C-103 of the Chapter:

> A Club ... is distinctly private in character if ...:
>
> ....
>
> (2)its character as an institution, club, or association is such that, under the constitutional doctrines of freedom of association (including expressive association) and privacy prevailing in the law at the time of the hearing, the Constitution of this state or of the United States requires that Section 40C-102 [("Unlawful practices")] not be applied against it.

As noted, consistent with prevailing law, and as reflected in the criteria in the Chapter for establishing "distinctly private" status, the City must prove more than the fact that a club might serve to promote or advance business or a business relationship between, or for, its members.

Obviously, business benefit might spring from any association, meeting, or encounter. It is well known that ofttimes it is "not what you know, but who you know"; and

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[17] After determining that no material fact issue existed and recognizing the spectrum upon which private relationships may fall, the district court evaluated the several factors and concluded that the Clubs "are entitled to the fullest protection of the First Amendment's right to privacy and freedom of intimate association" because they "met every factor in determining private club status and because they have very selective membership policies designed to ensure comradery and close personal acquaintances".

people often prefer, in any event, to do business with friends or acquaintances. But this fact alone cannot be the basis for whether a club receives private association protection under the First Amendment. If it were, no club could be private for purposes of that protection. The City — and the Chapter — recognize this; hence, the City must prove more (or, for summary judgment purposes, present a material fact issue).[18] *See, e.g., Roberts*, 468 U.S. at 633

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[18] In its brief, the City states that government "has absolutely no legitimate interest in the affairs of truly private Clubs who have not been interjected into public economic life; and [posits that] it may well be that the ... clubs will be determined to be distinctly private in the ... Commission proceedings." But, without any reference to the record, it then claims that the Clubs have been injected into public economic life:

> Surely a substantial issue of fact was raised as to the alleged "non-business" character of the Clubs. In terms of the City's legitimate interest in regulating trade and economic activity to prevent discrimination, the entanglement of a club in business affairs should not be ignored because the club has been consistently "exclusive" — when clubs become entangled in the public life of a community through subsidization by businesses who derive a business advantage from the club, "exclusiveness" (or discrimination against disadvantaged groups) is precisely the evil which the state seeks to inhibit under its police power. The state should not permit a business-related club — whose members derive tax and income advantages by having their businesses pay their dues and fees as a legitimate business expense — to insulate its discrimination from government regulations by showing how narrow [,] *long-standing*, and *thorough* it has been in excluding all but a select group of white non-semitic males of a limited ethnic genealogy.
>
> ...
>
> In a City in which both social institutions and major economic institutions have historically been controlled and dominated by an "exclusive" small sector of society, it is

(O'Connor, J., concurring). but, as shown *infra*, it has failed totally to do so.

a.

The City maintains that the following creates a material fact issue, making summary judgment improper: "the clubs (especially the Boston Club) have historically been funded in large part by the businesses and professional entities of its members, reflecting that these business entities viewed club activities as being in furtherance of trade, business and professional advancement."[19] But, this broad assertion has no support in the summary judgment record. The City concedes that

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footnote 18 continued

> obvious that the utility of "exclusive " clubs for business purposes within "our own" set will be recognized by historically "exclusive" economic institutions such as banks, law firms, and "old line" business companies.

(Emphasis by City.)

[19] As hereinafter quoted, in response to the Clubs' summary judgment motion, the City made a similar conclusional claim in district court; it did not dispute the private status of those clubs on any basis except that they were places for promoting business:

> Plaintiffs are not entitled to a declaratory judgment or an injunction at this time because genuine issues of material fact relevant to their individual statuses preclude summary judgment. Defendants do not contest Plaintiffs' claims and evidentiary support that they are ... non-profit corporations whose members have common social interests and congeniality; that they each have selective and exclusive membership policies as well as restrictive (though very different) guest policies. However, Plaintiffs' statuses remain at issue because some evidence exists to contradict their joint claims that they are not ... fora for their members to

the *only* evidence supporting this broad assertion is that, in the past, a local bank paid fees for six of its officers at some of the clubs.[20] The bank had paid for either their dues, luncheon expenses, or both.[21] It is undisputed that these payments occurred.

b.

In actuality, what the City contests is the legal significance to be accorded those payments; no material fact issue exists in the summary judgment record. The district court's conclusion that the Clubs constitute private entities entitled to the fullest protection of the First Amendment was not a finding of fact; it was a conclusion of law based on that record. But, before reviewing freely this legal conclusion, it is necessary to review what the record discloses.

(i)

Founded in the 1800s, the Clubs have a longstanding history of existing exclusively for private, social purposes.

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footnote 19 continued

> create or foster valuable business contacts or that they otherwise do not serve or operate to advance the employment and professions of many of their members.

[20] Surprisingly, the City did not file a reply brief. It made this concession at oral argument in response to a direct question on this point.

[21] With respect to the six bank officers, the bank had paid such expenses for all six at the Boston Club, for one at the Pickwick Club, and for one at Louisiana Debating. We could not locate, nor did the City identify, any evidence indicating that any Stratford Club member's dues or expenses were paid by his employer.

In addition to serving purely social functions, the Clubs prohibit the transaction or discussion of any business on their premises.[22] In order to enforce this prohibition, no member or guest can display or offer a business card, or display business papers. Accordingly, the Clubs have a purely social purpose and history.[23]

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[22] Interestingly, it appears that the nonresident complainant's reason for wanting to join the Clubs was for business purposes, as reflected by the following deposition testimony by the Commission's Executive Director:

> Q. Do you know ... why [the complainant] elected to contact these four clubs?
>
> A. The information that he personally provided to the Commission, namely, myself ... — because that particular question was asked — was that he had intentions of establishing a business here in New Orleans — namely, a temporary personnel service, which is the same type of business that he has in San Francisco and San Diego, California. It was his desire to initially try to become [a] member[] of not one but all four clubs for the purposes of establishing business relations and contacts necessary for him to start to meet potential clients for his business — at least, that was what was provided to me.
>
> Q. So [the complainant] fully intended to use the facilities of the clubs and the membership of the clubs for business purposes?
>
> A. Yes.

(*But see* note 6, *supra*; the complainant stated that, in addition to San Francisco, his business was in Los Angeles, not in San Diego as testified by the Executive Director.)

[23] In contrast, the purpose of the Rotary Clubs was described as "to produce an inclusive, not exclusive, membership, making possible the recognition of all useful local occupations, and enabling the club to be a true cross section of the business and professional life of the community." *Rotary Club*, 481 U.S. at 546. They sought inclusive fellowship

The Clubs' members share common social interests and backgrounds; often, the relationships predate membership in the Clubs through either family, religious activity, or other social groups. The criteria the Clubs use in selecting members include character, relationships and acquaintances, congeniality, and compatibility. Thus, a close nexus exists between the Clubs' purposes and membership criteria.[24]

Like the membership criteria, the admission process is very restrictive. Only existing members may propose a new member, and a proposal does not ensure admission. The Clubs engage in a fairly rigorous screening process to determine whether the prospective new member meets that club's criteria. Finally, whether to admit the prospective member is voted on by the general membership. A very limited number of objections deny membership: five at the

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footnote 23 continued

based on diversity of interests. *Id.* at 546-47. Accordingly, the Supreme Court noted that this did not suggest "the kind of private or personal relationship to which we have accorded protection under the First Amentment." *Id.* at 547.

[24] In contrast, Rotary Clubs sought "to produce an inclusive, not exclusive, membership", and, in so doing, were instructed "to avoid 'arbitrary limits on the number of members in the club,' and to 'establish and maintain a membership growth pattern.' " *Rotary Club*, 481 U.S. at 546-47. As for the Jaycees, its local chapters were described as "basically unselective groups" who "[a]part from age and sex", did not "employ any criteria for judging applicants for membership, and new members [were] routinely recruited and admitted ...." *Roberts*, 468 U.S. at 621.

Boston Club; three at each of the others.[25]

(iii)

Each club has only one facility, which is maintained for the exclusive use of its members and guests. No signs outside the Clubs' buildings identify the locations to the public.[26] Non-members are strictly prohibited from using the facilities.

Even though the Clubs permit members to bring guests, this practice is severely limited. Louisiana Debating prohibits its members from bringing or inviting any male guests, at any time and under any circumstances. Female guests are permitted rarely, but usually, they are the members' wives. At the Boston and Stratford Clubs, male residents of the City are strictly prohibited from attending as guests; women and children residents may be accompanied by a member, but on extraordinary occasions; the inviting of male nonresidents is strictly limited according to the time, frequency, and occasion of the visit. The Pickwick Club permits nonresident males to attend as guests during the noonday meals, provided the guest is a

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[25] At the Jaycees, "new members [were] routinely recruited and admitted with no inquiry into their backgrounds. In fact, a local officer testified that he could recall no instance in which an applicant had been denied membership on any basis other than age or sex." *Roberts*, 468 U.S. at 621. Local Rotary Clubs were "instructed to 'keep a flow of [membership] prospects coming' to make up for [a 10% annual] attrition [rate] and gradually to enlarge the membership." *Rotary Club*, 481 U.S. at 546.

[26] This is in stark contrast to the Rotary Clubs, which sought to keep their "windows and doors open to the whole world". *Rotary Club*, 481 U.S. at 547.

friend or close relative of the member and has some basis for a social acquaintance with other members; women and resident males are permitted, but only at limited times and with the approval of the club's Board of Governors.[27]

(iv)

The Clubs are managed and controlled locally by their members; either directly, by an elected Board of Governors, or by both; none of the Clubs is associated with or controlled by a national organization. Additionally, the Clubs restrict total membership to a limited number. The Pickwick Club's regular members are limited to 500; Louisiana Debating, 325 residents; the Stratford Club, 350 residents and a limited number of nonresidents; and, the Boston Club, 600 residents and 400 nonresidents.[28] Additionally, the Clubs operate as not-for-profit corporations.

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[27] For the Jaycees, "much of the activity central to the formation and maintenance of the association involve[d] the participation of strangers to that relationship." *Roberts*, 468 U.S. at 621. As for the Rotary Clubs, many of their "central activities [were] carried on in the presence of strangers" and "[m]embers [were] encouraged to invite business associates and competitors to meetings". *Rotary Club*, 481 U.S. at 547.

[28] The Jaycees' policy-making authority was vested in a national board consisting of delegates from local chapters; it had 7,400 local chapters, *Roberts*, 468 U.S. at 613. Rotary International had 19,788 local organizations in 157 countries. *Rotary Club*, 481 U.S. at 538-40, 546.

As for the number of members, the Jaycees had 295,000 national members, and Rotary International nearly 900,000 members. As Justice O'Connor recognized in *New York State Club Ass'n*, a club in a large city, such as New York, "with over 400 members may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence" over the city's attempt to ban discrimination within the club. 487 U.S. at 19 (O'Connor, J., concurring). We note also that the Seventh Circuit determined that the Boy Scouts was a private club

c.

Against this factual backdrop, we note again that the Chapter, adopted in 1991, was modeled after the New York City ordinance at issue, in 1988, in *New York State Club Ass'n*, where the Court recognized that "there may be clubs that would be entitled to constitutional protection". *New York State Club Ass'n*, 487 U.S. at 12. Obviously, the Clubs are not similar to the Jaycees or the *Rotary*. Relatively small in size, they seek to maintain an atmosphere in which their members can enjoy the comradery and congeniality of one another. Employing very restrictive guest and admission policies, they seek to remain isolated. In light of the undisputed facts, including the isolated dues payments by a single employer, we conclude, as did the district court, that the Clubs constitute organizations whose location on the spectrum of personal attachments places them near those that are "most intimate".[29] Accordingly, they enjoy the fullest protection

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footnote 28 continued

under the Civil Rights Act, despite having five million members. *Welsh*, 993 F.2d at 1276-77 (despite its size, Boy Scouts was still a private club because of its "plan or purpose of exclusiveness").

[29] As noted, the only evidence supporting the City's contention that the Clubs are not private entities entitled to constitutional protection was the limited payment of dues or luncheon expenses by a local bank for six of its officers who were members of at least one of the Clubs. Whether such payments should even be considered in evaluating the status of an organization has not been addressed by the Supreme Court, nor do we need to decide that question here. For purposes of this opinion, we assume, without deciding, that they should be considered.

The City's reliance on these payments is evidently based, in part, on the Chapter's definition of "public accommodation". The definition includes clubs which "regularly receive[] payment for dues, fees, ... meals

of their right of private association.

3.

Having determined that the Clubs are constitutionally protected private entities, we arrive at the critical issue in this appeal: whether the proposed investigation of the administrative complaints, as well as other Commission proceedings that might follow, threatens unduly the Clubs' right of private association. We conclude that it does.

Of course, as is also true for expressive associational rights, the constitutional right of private association is not protected absolutely against infringement by the state. As stated in *Rotary Club,* the protection is "againsst unjustified government interference". 481 U.S. at 544. As a fundamental right, however, any such infringement is subject to strict scrutiny. *McCabe v. Sharrett,* 12 F.3d 1558, 1566 (11th Cir. 1994). Strict scrutiny analysis requires the

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footnote 29 continued

or beverages, directly or indirectly, either from or on behalf of nonmembers or members for or in the direct or indirect furtherance of trade or business ...." Section 40C-101(2). As noted, this definition is based on the ordinance considered in *New York State Club Ass'n.* That ordinance covered clubs which had at least 400 members, provided regular meal service, and received regular payments "directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." *New York State Club Ass'n,* 487 U.S. at 12.

In addressing the criteria in the New York ordinance, the Court stated that "[t]hese characteristics are at least as significant in defining the nonprivate nature of these associations, because of the *kind of role that strangers play in their ordinary existence ....*" *Id.* at 12 (emphasis added). The City expanded the definition in *New York State Club Ass'n* to include payments received on behalf of, not only nonmembers, but also members.

government to demonstrate that (1) the state action serves a compelling state interest which (2) cannot be achieved through means significantly less restrictive of one's associational freedom. *See, e.g., Dart v. Brown,* 717 F.2d 1491, 1498 (5th Cir. 1983), *cert. denied,* 469 U.S. 825 (1984). *See also Thomas v. Review Bd. of Ind. Employment Sec. Div.,* 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *Clark v. Library of Congress,* 750 F.2d 89, 95 (D.C. Cir. 1984) (burden is on the government to show strict scrutiny requirements are met).

As for the first prong of this analysis, it is uncontested that the eradication of discrimination in places of public accommodation constitutes a compelling state interest. Thus, the crux of this appeal is whether the means adopted by the city interfere impermissibly with the Club's right of private association. The City failed to address directly how its investigative methods and other procedures are the least intrusive interference with that right. Instead, in order to demonstrate that the procedures do not interfere impermissibly, the City addresses only three areas; it claims (1) that the Chapter would not require highly public proceedings; (2) that it could not demand membership lists from the Clubs; and, (3) that liberal discovery in the federal court proceeding to which the Clubs subjected themselves equates with the powers it possesses under the Chapter.[30] We consider these claims

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[30] These claims appear to be in response to the district court's conclusion that the Clubs established

to be the City's attempt to satisfy its burden of showing that its methods and procedures are the least intrusive.

In analyzing whether these identified City procedures are the least intrusive upon the Clubs' right of private association, we keep in mind that "associational rights 'are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference,' ... and that these rights can be abridged even by government actions that do not directly restrict individuals' ability to associate freely." *Lyng v. International Union, United Auto. Aerospace & Agric. Implement Workers of Am.*, 485 U.S. 360, 367 n.5 (1988) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)).

a.

With respect to proceeding on the complaint, the investigation and hearing fail to ensure adequate safety for the Clubs' private association right. The City attempts to

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footnote 30 continued

> that there is a reasonable probability that the [Commission's] investigation into the complaints of discrimination would publicly reveal its membership lists and other intimate aspects of [the Clubs] that would have a chilling affect on their members, First Amendment rights.... The [Commission's] investigative powers include the right to compel production of documents and testimony of witnesses at a public hearing. Judging from [the City's] First Request for Production of Documents, the breadth of the testimony and documents likely to be sought during the public hearings by the [Commission] is far-reaching and certainly contains private and sensitive Club matters deserving of constitutional protection.

demonstrate that any hearing would not be overly intrusive by relying upon Louisiana state statutes. Specifically, it contends that La. Rev. Stat. 51:2262(F), in conjunction with the state's open meeting law (La. Rev. Stat. 42:6.1(A)(4) & (8)), provide an adequate safegard against intrusion into the Clubs' intimate affairs.[31] At oral argument, however, while acknowledging that the hearing is public, the City suggested, without any positive support in the Chapter, that the information could be considered in *camera*.

The City's reliance upon state statute is misplaced

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[31] La. Rev. Stat. 51:2262(F) provides:

> It is unlawful for a commissioner or employee of the commission to make public with respect to a particular person, without his consent, information obtained by the commission pursuant to its authority under this Section except as reasonably necessary to the conduct of a proceeding under this Chapter.

The open meetings law, La. Rev. Stat. 42:6, provides, in part, that "executive session shall be limited to matters allowed to be exempted from discussion at open meetings by R.S. 42:6.1." In turn, La. Rev. Stat. 42:6.1(A), provides, in pertinent part:

> A public body may hold an executive session ... for one or more of the following reasons:
>
> ....
>
> (4) Investigative proceedings regarding allegations of misconduct.
>
> ....
>
> (8) Or any other matters now provided for or as may be provided for by the legislature.

for several reasons. First, state law does not compel the Commission to operate in executive session. The decision to do so is discretionary ("A public body may ..."). Thus, even if state law empowered the Commission to conduct its hearing in executive session, that is solely at the option of the Commission. Second, the City's reliance on La. Rev. Stat. 51:2262(F) attempts improperly to expand the statute's scope. It applies only to the Louisiana Commission on Human Rights, not the Commission created by the Chapter. See La. Rev. Stat. 51:2232(1) (" 'Commission' means the Louisiana Commission on Human Rights").

Moreover, even if we assume that the Commissions' investigative procedures and the hearing could be kept from being public, section 40C-7 directs the Commission, "after the completion of any hearing, [to] make a report in writing to the Mayor and City Council setting forth the facts found and its recommendations or decision ..." The City has failed to indicate how such a disclosure will not infringe impermissibly upon the Clubs' right of private association.

b.

The City has failed also to demonstrate that the Chapter prevents it from demanding the Clubs' membership lists. The City maintains that section 40C-52 provides an adequate safeguard. The section provides that "[t]he Commission shall not require the production of names from a general membership list of any club that is a place of public accommodation."

But, the section refers only to "Place[s] of public ac-

commodation"; no membership list protection is provided for private clubs. The City claims that it would be absurd not to apply section 40C-52 to private clubs during its proceedings; but, the Chapter is very clear — a private club, *i.e.*, not a place of public accommodation, is not protected.[32]

c.

By coming into federal court, the Clubs became subject to discovery; this may have resulted in their disclosing certain information, including about their members, which they would have otherwise preferred not to do. On the other hand, it is arguable that it is the least intrusive method available to them for the vindication of their right of private association. At least in federal court, the Clubs enjoy two protections unavailable before the Commission. First, they were before a neutral judge, not a hearing officer appointed by the Commission's Executive Director. Second, federal courts control the disclosure of evidence in discovery and at a hearing via rules of evidence and civil procedure; the Chapter provides that a Commission hearing "shall not be bound by the strict rules of evidence prevailing in courts of law or equity." Section 40C-53(c)(2). Additionally, the City stated at oral argument that, in conducting a hearing, it would be entitled to do everything it did in federal court with the exception of requesting membership lists. (As noted, it is far from clear that the

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[32] At oral argument, the City acknowledged that the Commission has the power to demand the tax returns of members, but asserted that they could be redacted in order not to disclose the members' names. (Apparently, this power flows from the Commission's subpoena power. Section 40C-53(a).) The power to mandate the disclosure of even redacted tax returns indicates how intrusive the Chapter probes into the private affairs of the Clubs and their members.

City would not be able to obtain membership lists in a Commission proceeding.)

In sum, the city has failed to meet its burden of demonstrating how the means it has selected to enforce the Chapter are the least intrusive on the Clubs' and their members' right of private association.[33] We hold, therefore, that the Chapter, as applied to the Clubs, is unconstitutional.

III.

Discrimination can find no rest in a place of public accommodation. Whether it should be suffered to abide in private clubs is debatable among persons of good will. But, the Constitution trumps; those clubs have a right of private association under the First Amendment with which the government may not interfere impermissibly. Concomitantly, if those clubs must go public, in order to remain private, then their privacy rights ring hollow indeed; "the flame is not worth the candle".

Perhaps the Clubs should have elected instead to seek an administrative "distinctly private" exemption under the Chapter; no doubt, that might well have been the easier course. But, the easier course is not the required

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[33] The district court has retained jurisdiction. As noted, the City addressed only three items in seeking to meet its burden of demonstrating that its means are the least intrusive on the Clubs' private association right. It goes without saying that our holding that it failed to meet its burden as to those three items should not be read to mean necessarily that, if it revised its procedures as to them, the Chapter would otherwise pass constitutional muster in this, or a similar, case.

course; were it so, this would be a far different Nation.[34] And, when persons seek to vindicate constitutional rights in federal court, they will be heard, absent more compelling reasons under that same Constitution for the court to stay its hand. The judgment is

AFFIRMED.

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[34] It is well to remember that, boiled down, individual liberty under the First Amendment is at stake. *Roberts*, 468 U.S. at 618. As already referenced,

> the constitutional shelter afforded [certain hightly personal] relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

Id. at 619. That, in the final analysis, liberty is at stake brings forward Patrick Henry's admonition, known to all, at the Virginia Convention in Richmond, against taking the easier course and not asserting one's rights in exchange for ease and comfort; it is as true today as it was in 1775:

> Is life so dear or peace so sweet as to be purchased at the price of chains and slavery? Forbid it, Almighty God, I know not what course others may take, but as for me, give me liberty or give me death!

Speech of Patrick Henry (Mar. 23, 1775) in THE REVOLUTIONARY YEARS 123, 125 (Mortimer J. Adler, ed., 1976).

FILED

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OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1994

THE CITY OF NEW ORLEANS, THE HUMAN RELATIONS COMMISSION AND EARL D. JACKSON, SR., IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE HUMAN RELATIONS COMMISSION

Petitioner

VERSUS

LOUISIANA DEBATING AND LITERARY ASSOCIATION, THE STRATFORD CLUB, THE BOSTON CLUB OF NEW ORLEANS AND THE PICKWICK CLUB

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI VOLUME II

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APPENDIX ITEM - 2

MINUTE ENTRY
McNAMARA, J.
MARCH 10, 1994

FILED
MAR 10 '94

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LOUISIANA DEBATING AND LITERARY ASSOCIATION, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 93-658 AND CONSOLIDATED CASES
CITY OF NEW ORLEANS, ET AL	*	SECTION "D" (4)

Before the court are two Motions for Summary Judgment filed by Plaintiffs. This action involves four consolidated cases which contain common questions of both law and facts. Three Plaintiffs, the Louisiana Debating and Literary Association ("Louisiana Club"), the Stratford Club, and the Boston Club of New Orleans ("Boston Club"), join in one of the pending Motions, and the Pickwick Club, the other Plaintiff in this matter, filed its own Motion for Summary Judgment. Defendants have filed memoranda in opposition to both Motions, which are

before the court on briefs only without oral arguments.

I. BACKGROUND

Plaintiffs are a group of private social clubs in the City of Orleans (the "City"), threatened with investigation by the City pursuant to a City Ordinance which, in part, regulates membership in clubs satisfying the Ordinance's definition of "public accommodation." The Ordinance in question, which is codified at Chapter 40C of the Code of the City of New Orleans, was enacted on December 19, 1991. Chapter 40C proscribes and criminalizes discrimination in the membership of clubs meeting the definition of "public accommodation" if such discrimination is based upon race, color, creed, religion, national origin, ancestry, age, sex, sexual orientation, physical condition or disability.

The Ordinance defines "public accommodation" to include any club which (1) has more than 75 members, (2) provides regular meal service, and (3) regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages, directly or indirectly, either (i) from or on behalf of non-members for or in the direct or indirect furtherance of trade or business, or (ii) from or on behalf of any person who claims such payment as a business expense for tax purposes. Section 40C-101(2). The Ordinance expressly exempts from its definition of "public accommodation" any bona fide private club which does not meet the above-referenced definition. Section 40C-101(3)a. Furthermore, the Ordinance provides that a club is distinctively private in character and outside the reach of the Ordinance if the state or federal constitutional doctrines of privacy or

freedom of association would require that the Ordinance not be applied against a club. Section 40C-103(b)(2).

Before a club can benefit from this distinctively private club exception, however, that club must be listed as such in the registry of the Human Relations Commission ("HRC"). Before the HRC will certify a club as distinctively private, the club must complete an application form and present it to the Director of the HRC, who will then schedule a public hearing on the club's application. The applicant must publish notice of its application and the date of the hearing in the Official Journal three times, each at its own expense. At the public hearing, anyone is free to attend and support or oppose the application, and the HRC and its staff are free to interrogate the applicant's representatives without any stated limitations. Ch. 40C-103.

In addition to providing the HRC with the responsibility of conducting public hearings on applications seeking private club status, Chapter 40C also requires the HRC to investigate complaints of discrimination by members of the public and to enforce the Ordinance. The HRC has the power to compel the production of documents and the testimony of witnesses by issuing subpoenas.

On February 17, 1993, Plaintiff, the Pickwick Club, received a letter from the HRC notifying it that Clarence Hunt, a resident of San Francisco, California, had filed a complaint of discrimination against Plaintiff. The following day, on February 18, 1993, the other three Plaintiffs received a letter from the HRC notifying them that the HRC would conduct an investigation of Plaintiffs pur-

suant to a complaint filed with the HRC by the same Clarence Hunt, alleging discrimination in violation of Chapter 40C.

Fearing that application of Chapter 40C would unconstitutionally deprive both them and their members of their right to privacy and freedom of association, Plaintiffs filed the present action pursuant to 42 U.S.C. § 1983 seeking: (1) a declaration that Chapter 40C does not apply to the Plaintiffs, or alternatively, that application of Chapter 40C to Plaintiffs violates their rights under the United States Constitution; (2) the issuance of a permanent injunction prohibiting any investigation by Defendants of Plaintiffs pursuant to Chapter 40C; and (3) the issuance of a permanent injunction enjoining Defendants from applying or attempting to apply Chapter 40C to Plaintiffs. Plaintiffs also assert several pendant state law claims.[1] Arguing that

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[1] Plaintiffs' pendant state law claims are:

(1) The Ordinance contravenes a general act and the general policy of the State of Louisiana and is invalid;

(2) The Ordinance as applied to Plaintiffs exceeds the authority of Defendants and serves no legitimate public interest of the City;

(3) The Ordinance is an unauthorized local regulation of private or civil relationships in violation of Article 6, Section 9 of the Louisiana Constitution;

(4) Plaintiffs are not public accomodations within the meaning of the Ordinance;

(5) The enactment of the Ordinance exceeds the authority of the City Council of New Orleans under the City's Home Rule Charter in that the Ordinance improperly delegates to the HRC powers reserved by the Home Rule Charter exclusively to the City Council; and

there are no genuine issues of material fact and that they are entitled to judgment as a matter of law, Plaintiffs filed the present Motions for Summary Judgment.

Defendants' opposition to the pending Motions is primarly based on two grounds. First, Defendants argue that genuine issues of material fact exist, and thus, summary judgment is improper. Second, Defendants argue that Plaintiffs' constitutional claims, which are based upon their alleged status as private clubs, amount to a facial attack on Chapter 40C. To succeed in a facial challenge, Defendants correctly point out that the court must find that the Ordinance cannot be applied in a constitutional manner. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 797-98 (1984). Defendants note that Chapter 40C can be constitutionally applied to private clubs because the Ordinance affords clubs the opportunity to raise and to prove their status as a private club at the public hearing before the HRC. If the director of the HRC determines that Plaintiffs are indeed private clubs under prevailing case law, then the Ordinance expressly exempts Plaintiffs from its reach. Along this same line, Defendants contend that Chapter 40C can be constitutionally applied to private clubs because it allows private clubs to seek admission as such into the registry and provides for a public hearing before the HRC on the issue of the applicant club's status.

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footnote 1 continued

(6) The rules promulgated under the Ordinance are inconsistent with the Ordinance itself, the application of the Ordinance to Plaintiffs' conflicts with express terms of both the Ordinance and such rules, and the Ordinance defines key terms in a manner which deviates from state and federal law.

At the outset, the court finds that Plaintiffs are challenging the Ordinance on constitutional grounds only as the Ordinance applies to them. Indeed, the prayers for relief seek a declaration that Chapter 40C does not apply to Plaintiffs, or alternatively, that application of the Ordinance to Plaintiffs violates their rights under the United States Constitution. The court has found no reference by Plaintiffs that the Ordinance cannot be constitutionally applied to anyone. Instead, Plaintiffs specifically assert in their supporting memoranda that they seek a ruling that Chapter 40C is invalid as applied to them because they, as bona fide private clubs, are entitled to First Amendment protection. *See* Memorandum of Pickwick Club at p. 3 and Memorandum of Louisiana Club, Stratford Club, and Boston Club at pp. 3, 50. Accordingly, this court will analyze Plaintiffs' constitutional claims as an "as applied" challenge to the Ordinance.

II. ANALYSIS

Each Plaintiff club brings this action for itself and on behalf of its members. At the heart of this matter is Plaintiffs' contention that they are private clubs pursuant to United States Supreme Court jurisprudence. As private clubs, Plaintiffs argue that they have a constitutionally protected right of privacy and freedom of association under the First Amendment, as applied to the states through the Fourteenth Amendment. Moreover, Plaintiffs allege that any application of Chapter 40C to them, including any investigation of them pursuant thereto, is an unconstitutional infringement on their rights of privacy and freedom of association. In order to resolve this constitutional issue, therefore, the court must make two separate inquiries.

First, whether Plaintiffs are in fact private clubs under Supreme Court jurisprudence - if not, the court need go no further. Second, whether the HRC's investigation into the complaint of discrimination against Plaintiffs constitutes unwarranted governmental intrusion into (1) an individual's choice to enter into and maintain certain intimate or private relationships,[2] or (2) the right of an individual not to have his private affairs made public by the government.[3]

1. *Whether Plaintiffs are Private Clubs:*

Concerning a state's attempt to eliminate discrimination in private organizations, the courts have consistently recognized that the First Amendment right of freedom of intimate association provides individuals with a substantial measure of sanctuary from unjustified state interference into the formation and preservation of certain kinds of highly personal relationships. *Roberts v. United States Jaycees,* 468 U.S. 609, 618 (1984). Because the Supreme Court has identified a qualitative continuum of personal relationships, this court must ascertain where each Plaintiff Club's "objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Id.* at 620. Inquiry into Plaintiffs' locale on this continuum of personal relationships, under the private club exception, involves consideration of several factors: (1) whether the club has a longstanding history of serving a purely social, non-business purpose;

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[2] *Board of Directors of Rotary International v. Rotary Club of Duarte,* 481 U.S. 537, 544 (1987).

[3] *Whalen v. Roe,* 429 U.S. 589, 599 (1977).

(2) whether the club has a nexus of common social interest and congeniality; (3) whether the club has a selective and exclusive membership criteria; (4) whether the club secludes its activities and facilities from the public; (5) whether the club employs restrictive guest policies; (6) whether the club is conrolled by its members; (7) whether the club is small in its size and scope; and (8) whether the club is a nonprofit organization. *New York State Club Ass'n v. City of New York,* 487 U.S. 1 (1988); *Board of Directories of Rotary Int'l v. Rotary Club,* 481 U.S. 537 (1987); *Roberts v. United States Jaycees,* 468 U.S. 609 (1984); *Daniel v. Paul,* 395 U.S. 298, 301-302 (1969); and *Welsh v. Boy Scouts of America,* 993 F.2d 1267 (7th Cir. 1993), *cert. denied* 114 S.Ct. 602 (1993). Upon consideration of these eight factors, the court concludes that each Plaintiff has established that it is a private club located at the most intimate end of the qualitative continuum of personal relationships.

A. *Purely Social, Non-business Purpose and History*

In *Rotary Club,* 481 U.S. 537 (1987), the Supreme Court held that enforcement of California's anti-discrimination statute against the Rotary did not violate the club's right to freedom of association. In reaching its conclusion, the Court emphasized that the stated purpose of the Rotary was to produce an inclusive membership enabling the club to be a true cross section of the community. The Rotary was designed to aid the community and to improve international relations. *Id.* at 546. Thus, the court noted that Rotary's "inclusive fellowship for service based on diversity of interest, . . . does not suggest the kind of

private or personal relationship to which we have accorded protection under the First Amendment." *Id.* at 546-47.

In contrast to *Rotary,* each Plaintiff Club was founded in the 1800's and has a longstanding history of existing exclusively for private, social purposes. *See* Pickwick Club's Articles of Incorporation and Mayer, Geary and Combe affidavits. The By-Laws of the Pickwick Club reveal that it is a "private social, literary, cultural and recreational club designed to promote the gathering and social intercourse of friends and family members . . . ." Likewise, the charters of the Louisiana, Stratford, and Boston Club reveal that they are organized to promote "social intercourse among members" and to pursue "social purposes." *See* Mayer, Geary and Combe affidavits. Moreover, the Louisiana, Stratford, and Boston Clubs' activities are all private, consisting of noontime meals and certain parties and dances attended only by their respective members and their guests. *See* Mayer, Geary and Combe affidavits, Depositions of Combe at 50-52, Gilly at 40-41, 48-49, Hebert at 9-12, Maheu at 33-35, Mayer at 34-36, and Milling at 27. The Pickwick Club holds social dinners about once a month which are also limited to its members and their guests. *See* Depositions of Johnsen at 25 and Vilkhu at 20.

In addition to serving purely social functions, each Plaintiff Club prohibits the transaction or discussion of any business on their premises. To ensure this, Plaintiffs prohibit any member or guest from displaying, or offering, a business card or from displaying business papers on the respective Club premises at all times. *See* Mayer, Geary and Combe affidavits and Depositions of Flower at 15;

Pickwick Club's By-Laws and Articles XI § 1. The rule against conducting business is not just a rule but it is strictly adhered to by the Club's members. *See* Mayer, Geary and Combe affidavits and Depositions of Bruns at 60, Flower at 34-40, Geary at 72, 108, Janvier at 51, Mayer at 100, Milling at 42 and Monsted at 43; Depositions of Vilkhu at 29-32, Flower III at 34-40, Powell III at 65-66. After reviewing the entire record, this court finds that there is no genuine factual issue that each Plaintiff Club has a purely social, non-business purpose and history.

B. *Common Social Interest and Congeniality and Selectivity and Exclusivity in Selection of Members*

In ruling that the Jaycees, a young men's civic organization, lacked distinctive characteristics that might have afforded them constitutional protection in restricting membership to males only, the court noted "[a]part from age and sex, neither the national organization nor the local chapter employ any criteria for judging applicants for membership . . . ." In fact, one "local officer testified that he could recall no instance in which an applicant had been denied membership on any basis other than age or sex." *Roberts v. United States Jaycees,* 468 U.S. 609, 621 (1984). Likewise, the court found that Rotary did not possess the kind of private or personal relationship to which it has accorded First Amendment protection, in part, because each club was instructed to accept all qualified persons, to not limit the number of members, and to establish a membership growth pattern. *Rotary Club,* 481 U.S. 537, 547 (1987).

Unlike the Jaycees and Rotary, Plaintiffs' members

share similar social interests and backgrounds, and oftentimes, their relationships pre-date membership in the Club through family, church, or other social groups. *See* Mayer, Geary and Combe affidavits and Depositions of Geary at 20, Gilly at 74, and Mayer at 30; and Johnsen affidavit at 3. The Pickwick Club selects its members based upon familial relationships, social acquaintances, congeniality, and compatibility. *See* Johnsen affidavit and Depositions of Kock III at 38 and Flower III at 33-47. Similarly, the Louisiana, Stratford, and Boston Clubs select their members based upon character, honesty, integrity, compatibility, and most importantly, congeniality among the members. *See* Mayer, Geary and Combe affidavits and Deposition of Gilly at 58. Therefore, there is a close nexus between the stated purpose of Plaintiff Clubs and their criteria for membership.

In addition to this close nexus between the Clubs' purposes and membership criteria, each Club employs an extremely restrictive membership policy. Indeed, new members are proposed only by the existing members and neither Club allows an individual to "apply" for membership. *See* Pickwick Club's By-Laws, Art. 1 § 2; Mayer, Geary and Combe affidavits. After a proposal for membership has been made, the respective Club begins a fairly rigorous screening process to ascertain whether the prospective member meets the selective criteria of the respective Club. If the proposed member passes the screening process, the general membership is then given the opportunity to approve or disapprove of the proposed member. The general membership may reject admission for any proposed member by registering the requisite number of objections as required under the respective Clubs' By-Laws; for

the Pickwick Club, three objections suffice; five objections suffice for the Boston Club; and for the Louisiana and Stratford Club, three objections prevent admission. *See* Pickwick Club's By-Laws, Art. I § 2 and Mayer, Geary and Combe affidavits. Many proposed members are not elected or approved for membership. Thus, Plaintiff Clubs employ a highly selective membership policy.

C. *Seclusion of Activities and Facilities from the Public*

The Louisiana, Stratford, and Boston Clubs have only one facility each, and they are maintained for the exclusive use of members and, in limited instances, their guests. These facilities are never open to the public and there are no outward signs identifying their locations. The Clubs strictly prohibit non-members from using their facilities. *See* Mayer, Geary and Combe affidavits. The rules, current membership lists and activities of the Louisiana, Stratford, and Boston Clubs are completely private and outside the public's view. The Boston and Stratford Clubs have written rules prohibiting public statements or photographs relating to the Clubs' appearance, By-Laws, social functions or members. The Louisiana Club requires that each of its members pledge that its rules and activities will remain confidential. *See* Mayer, Geary and Combe affidavits.

Similarly, the Pickwick Club has only one facility and it owns the building in which its meeting rooms are located. There are no signs identifying its location. The Club's door is unmarked and locked twenty-four hours a day. Members enter the Club through use of a numbered

key pad whose entry code is changed regularly. *See* Johnsen's affidavit. The Pickwick Club is not open to the public and it does not lease its facilities to non-members under any circumstances. In short, the Pickwick Club's facilities are used only by its members and their guests. While the Rotary Clubs sought to keep their "windows and doors open to the whole world," *Rotary Club*, 481 U.S. at 547, each Plaintiff Club "bars its doors and has virtually no windows." *Pacific-Union Club v. Superior Court*, 283 Cal. Rptr. 287, 295 (Cal. App. 1st Dist. 1991). Thus, this court finds that Plaintiff Clubs' activities and facilities are secluded from the public.

D. *Restrictive Guest Policies*

The Louisiana Club outright prohibits its members from bringing or inviting any male guests, residents or non-residents, to the Club at any time and under any circumstance. On very rare, specially designated occasions, its members may invite female guests who are, on most instances, their wives. *See* Geary affidavit and Deposition of Gilly at 65. The Boston and Stratford Clubs prohibit male residents of the City from being guests. On extraordinary occasions, however, they do allow women and children residents to be guests while accompanied by a member. *See* Mayer and Combe affidavits and Depositions of Combe at 52 and Mayer at 36. Non-resident males may be guests under conditions strictly limiting the time, frequency, and occasion of the visit. No guests are permitted to bring other guests and no guests are allowed to attend any Club meeting. All non-resident guests must be a personal friend or close relative of the introducing member, who must believe that the guest will be welcomed by the other

members. *See* Mayer and Combe affidavits and Deposition of Gilly at 29-32.

The Pickwick Club allows its members to bring non-resident males as guests to dine during the noonday meals provided such guests are personal friends or close relatives of the members who have some basis for a social acquaintance with the other members. *See* Johnsen's affidavit and By-Laws, Art. XI § 1. Ladies are allowed as guests on invitation of the Board of Governors or on invitation of a member on such occasion and at such times as the Board of Governors determines. *See* By-Laws, Art. XI § 2. Only on rare occasion may resident males be admitted as guests and only then by invitation of the Board of Governors. *See* By-Laws, Art. XI § 3. Clearly, Plaintiff Clubs have definite rules on permitting guests and all point to a highly restrictive guest policy.

E. *Membership Control*

The Louisiana, Stratford and Boston Clubs are comprised of governing boards, committees, and memberships at large who meet on a regular basis in order to manage and govern the Clubs' affairs. Although the respective governing boards are responsible for the overall management duties, the members-at-large elect these boards, and therefore, the members directly control the management and operation of these Clubs. *See* Mayer, Geary and Combe affidavits and Deposition of Gilly at 56-60. Similarly, as demonstrated through its Articles of Incorporation and its By-Laws, the Pickwick Club's policies are determined only by its members and by its elected Board of Governors. *See* Articles of Incorporation, Art. V § 2; By-Lays, Art. VI §§

1, 2; and Deposition of Johnsen at 10. Based upon the uncontradicted evidence contained in the record, this court finds that Plaintiff Clubs are managed and controlled solely by their respective members.

F. *Small in Size and Scope and Not-for-Profit*

In denying the Jaycees First Amendment protection, the Supreme Court noted that the Jaycees had 295,000 national members in 7,400 local chapters. The Jaycees' policy making authority was vested in a national board consisting of delegates from local chapters. *Roberts,* 468 U.S. at 613. Likewise, in denying First Amendment protection to the Rotary Club, the Court noted that Rotary International had about 900,000 members, including 19,788 local clubs in 157 countries. *Rotary Club,* 481 U.S. at 539-40, 46.

In stark contrast, the Pickwick Club limits its regular membership to 550 persons. *See* Pickwick Club's By-Laws, Art. 1 & 11(a). The Pickwick Club has no connection with a larger institution or club. *See* Deposition of Johnsen at 50. The Louisiana Club caps the number of its resident members at 325, the Stratford Club at 350, and the Boston Club at 600. The Boston and Stratford Clubs also allow a limited number of non-resident and life members. The Louisiana Club extends non-resident memberships only to resident members who subsequently move away. *See* Mayer, Geary and Combe affidavits and Depositions of Bruns at 27, Deal at 30, 69, Gilly at 43, 67, Mayer at 31-32, and Maheu at 37-38. Like the Pickwick Club, neither the Louisiana, Stratford, nor the Boston Club is a member of any national association and none are part of any umbrella organization.

In considering the size of Plaintiff Clubs pursuant to the private club exception, this court is aware that the Seventh Circuit recently held that the Boy Scouts was a private club even though it had 5,000,000 members. *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1277 (7th Cir. 1993), *cert. denied* 114 S.Ct. 602 (1993). The *Welsh* court reasoned that, despite its millions of members, the Boy Scouts met the Supreme Court's requirements that there be a "plan or purpose of exclusiveness." *Id.* at 1276 (citation omitted). As demonstrated above, Plaintiff Clubs employ a highly selective membership criteria which ensures exclusiveness. Furthermore, this court finds that a club with 600 or fewer resident members, in such a large and diverse area as metropolitan New Orleans, is sufficiently intimate to warrant First Amendment protection.

An organization's status as for profit would tend to indicate it has a commercial rather than social purpose, which would weigh against affording a club with First Amendment protection. *Daniel v. Paul*, 395 U.S. 298, 301-302 (1969). Such is not the case with Plaintiff Clubs, however, as each is a not-for-profit Louisiana Corporation. *See* Pickwick Club's Articles of Incorporation, Art. I §§ 1, 2, and 3, and Mayer, Geary and Combe affidavits. After reviewing the record and finding that every factor used in determining private club status weighs in favor of Plaintiff Clubs, this court concludes that there is no genuine factual issue that each Plaintiff Club is a "private club" entitled to stringent First Amendment protection.

Defendants argue that summary judgment is improper because genuine issues of material fact exist concerning whether or not Plaintiffs are "private clubs." The

court finds no evidence in the record to support Defendants' argument or to refute the evidence presented by Plaintiffs.[4] Defendants first question whether Plaintiffs have shown themselves to have a purely social, non-business purpose and history because several officers of Whitney National Bank testified that, in times past, the bank, as a perk, reimbursed its officers for their club membership dues. This court has found no cases suggesting that reimbursement, as a perk, for dues in a "private club" has any bearing on that club's status. *See* Deposition of Milling at 20. Moreover, each bank officer testified that he had never conducted or discussed business at any of the Clubs, nor had he taken guests there for business purposes. *See* Depositions of Milling at 42-43, Mayer at 100, Bruns at 60, Janvier at 51 and Monsted at 43. Thus, there is no genuine issue concerning the purely social, non-business purpose of Plaintiff Clubs.

Defendants also argue that there is a genuine issue concerning the size of Plaintiffs because the exact membership numbers are not known. As this court has discussed above, more important than the number of members is how selective the club is in accepting its members. *Welsh*, 993

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[4] The record reveals that the parties had more than six months to conduct discovery. Three of the Complaints herein were filed on February 25, 1993, and the fourth Complaint was filed on March 2, 1993. By way of mutual agreement, the parties had until September 3, 1993 to finish all discovery. *See* Document No. 36. On August 23, 1993, Defendants sought a three week extension to conduct discovery because the City was under a four day work week and because there was not enough time to file a Motion to Compel before September 3, 1994. The court denied the Motion to Continue Discovery Deadlines finding that the stated reasons did not warrant a continuance. Subsequently, Defendants did timely file a Motion to Compel which was granted in part. *See* Documents No. 85 and 99.

F.2d at 1276. Contrary to Defendants' assertion, the record reveals that the Louisiana Club has 317 resident members and a total of 423. *See* Geary affidavit and Deposition of Maheu at 37. The Boston Club has 600 resident members and a limit of 400 non-resident members. *See* Deposition of Deal at 30. The Stratford Club has 333 resident members and a limited number of non-resident members. *See* Combe affidavit. Lastly, the Pickwick Club limits its membership to 550 persons. Thus, Defendants have failed to raise a genuine issue of material fact concerning the status of any Plaintiff Club, and this court finds that each Plaintiff is a "private club."

2. *Whether the City can Validly Apply Chapter 40-C to Plaintiffs:*

Unquestionably, the First Amendment right to freedom of intimate association shields individuals from unjustified state interference into the formation and preservation of certain kinds of highly personal relationships. *Roberts,* 468 U.S. at 618. Because the Supreme Court has identified a qualitative continuum of personal relationships, there necessarily exists a broad range of human relationships that may be permitted to make greater or lessor claims to First Amendment protection from particular state infringements. "Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics [determined by applying the factors discussed above] locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Id.* at 620. Because Plaintiff Clubs easily met every factor in determining private club status and because they have very selective membership policies designed to ensure com-

radery and close personal acquaintances, this court finds that Plaintiff Clubs are entitled to the fullest protection of the first Amendment's right to privacy and freedom of intimate association.

The First Amendment, in providing for a constitutionally protected zone of privacy, recognizes at least two kinds of important interests. One is an individual's choice to enter into and maintain certain intimate human relationships without undue intrusion by the State because of the role such relationships play in safeguarding the individual freedom that is the cornerstone of our constitutioinal scheme. *Roberts*, 468 U.S. at 617-618. This freedom of association is a fundamental right. *Id.* Another interest protected by the First Amendment is the right of an individual not to have his private affairs made public by the government. *Whalen v. Roe,* 429 U.S. 589, 599 n. 24. The question this court must now address is whether the HRC's proposed investigation into the complaints of discrimination by Plaintiff Clubs will unduly infringe on their rights to freedom of association and their rights not to have their private affairs made public by the government. Finding that this question must be answered in the affirmative, the court declares that Chapter 40-C cannot be constitutionally applied to Plaintiffs.

Defendants argue that Chapter 40-C can be constitutionally applied to Plaintiffs because the City has a compelling interest in eradicating invidious discrimination against its citizens and because Plaintiffs are free to assert their "private club" status during the administrative hearings before the HRC. The court agrees that the City has a compelling interest in preventing discrimination. The court finds, however, that the HRC's threatened investigation of

Plaintiffs, including public hearings coupled with the inevitable attendant publicity, would unduly burden Plaintiffs' First Amendment rights.

In *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958), the court held that First Amendment rights of privacy and freedom of association prevented the state from obtaining a membership list of the N.A.A.C.P. during the course of the state's investigation, In reaching this conclusion, the court emphasized:

> This court has recognized the vital relationship between freedom to associate and privacy in one's associations . . . .
>
> We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association . . . .
>
> We hold that the immunity from state scrutiny of membership lists which the association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment . . . .

Id. at 462, 466. As the *N.A.A.C.P.* case demonstrates, governmental investigation into purely private affairs oftentimes has a chilling affect on First Amendment rights that is as devastating, if not more so, than the final state

action taken after the investigation.

Moreover, Plaintiff Clubs have established that there is a reasonable probability that the HRC's investigation into the complaints of discrimination would publicly reveal its membership lists and other intimate aspects of Plaintiff Clubs that would have a chilling affect on their members' First Amendment rights. Chapter 40C created the HRC to investigate complaints of discrimination by members of the public and to enforce the Ordinance by imposing certain penalties. The HRC's investigative powers include the right to compel production of documents and testimony of witnesess at a public hearing. Judging from Defendants' First Request for Production of Documents, the breadth of the testimony and documents likely to be sought during the public hearings by the HRC is far-reaching and certainly contains private and sensitive Club matters deserving of constitutional protection.

For example, in this lawsuit, Defendants have sought production of the current membership lists of Plaintiffs and production of any rosters of officers and committee members including membership committee members and life members. Defendants also requested complete copies of all tax returns from 1988 through 1992 filed by each member of Plaintiff Clubs. Furthermore, Defendants sought to obtain a list and copy of all documents announcing and/or describing all events held at the Clubs after 1988. Thus, it is evident to this court that application of Chapter 40C to these Plaintiff Clubs expose them to HRC orders that they go back in time, at least until 1988, and publicly reveal in detail the names of every member and every officer, the internal rules and policies of the Clubs,

copies of each member's tax returns, and complete descriptions of every Club activity. Administrative application of Chapter 40C to clubs that have clearly established their status as "private clubs" located at the most intimate and of the continuum of personal relationships violates their First Amendment rights to privacy and freedom of intimate association.

The court notes that the Clubs' members have similar social interests and backgrounds and many have longtanding friendships among themselves. Oftentimes, their relationships were originally formed through family, church, or school functions. Moreover, criteria for membership includes character, honesty, integrity, congeniality and compatibility with existing members. Because of these intimate, family-like relationships among members, it is likely that members carry on activities at the Clubs in much the same way that they do at their homes. If the government can force Plaintiff members to publicly reveal these types of activities, then the First Amendment would have no utility. Clearly, the First Amendment provides individuals with definite and important rights, and exposing these private club members to revelation of these types of activities, along with members' tax returns and membership lists, violate the rights of these individuals not to have their private affairs made public by the government. *Whalen*, 429 U.S. at 599 n. 24.

Defendants note that Chapter 40C-103 sets forth a procedure by which a club may apply for and obtain designation as a "distinctively private" club. Upon receipt of a club's application to be placed in the registry of private clubs, the HRC assigns a date and time for public hearings

to be held. This hearing will again subject Plaintiff Clubs to the same inquiry of private and sensitive information as discussed above. The applicant must publish notice of the application and hearing three times in the Official Journal, all at the applicant's expense. Any interested person may appear at the public hearing to oppose the application. Chapter 40C-103(d). If the HRC designates a club as "distinctively private," such designation is valid for only three years. Chapter 40C-103(a). Even during this three-year period, however, the HRC can initiate proceedings for the removal of any club from the registry. The HRC can initiate these removal proceedings *sua sponte* or upon receipt of a written complaint. The HRC then publishes notice of the removal hearing and any interested person can attend the hearing and support the complaint. Chapter 40C-103(g). As applied to Plaintiff Clubs, Chapter 40C-103 envisions unwarranted future and repeated regulations of clubs deserving of the highest First Amendment protection.

The members of these private clubs have the right to be free from Government prying into their private affairs. To expose the individual members of these clubs to the hearing contemplated in Section 40C-53 is to subordinate their rights to governmental curiosity about their private affairs. The First Amendment does not permit such governmental intrusion. There is no question that ending public discrimination is a laudable goal and that invidious discrimination in any form is reprehensible. However,

> [w]hen the state intrudes into the membership policies of private clubs, it abridges the rights of club members to socialize with people of their own choosing.... Unless the state acts to serve a com-

> pelling interest unrelated to furthering its vision of socially acceptable behavior, it is simply pressing club members into service to send society a message of inclusion and equality.... [T]he first amendment protects associational choices, as it protects expression, from governmental efforts to establish an official view of a just society....
>
> Protecting the right of some social clubs to discriminate in selecting their members is the constitutional embodiment of the common sense that underlies the traditional respect accorded distinctively private groups. Private discrimination should be permitted when the value of providing equal access is outweighed by the damage to associational freedom: as to certain private social groups, forcing equal access "costs much in liberty and returns little in equity."

Note, *State Power and Discrimination by Private Clubs: First Amendment Protection for Non-expressive Associations,* 104 Harv. L.Rev. 1835, at 1850 and 1856 (1991).

Moreover, Plaintiff Clubs have clearly established in this forum their right to First Amendment protection by demonstrating that they are located at the most intimate end of the continuum of personal relationships. Because Defendants' application of Chapter 40C to Plaintiffs would unduly interfere with their right to enter into and maintain certain intimate or private relationships and their right not to have their private affairs made public by the government, this court finds that Chapter 40C is unconstitutional as applied to these Plaintiff Clubs. As our Supreme Court has noted:

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or a woman who his or her associates must be. The individual can be as selective as he desires.

See Gilmore v. City of Montgomery, 417 U.S. 556 (1974) *quoting Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 179-80 (1972) (Douglas, J. dissenting).

III. PENDANT STATE LAW CLAIMS

In addition to challenging the Ordinance on constitutional grounds, Plaintiffs also assert several pendant state law claims.[5] After reviewing the memoranda of counsel and the pendant state law claims, the court notes that only one such pendant claim was briefed by the parties and it, like several of the pendant claims, involves a facial attack on the Ordinance. For example, Plaintiffs argue that the Ordinance in question contravenes a general act and the general policy of the State of Louisiana and is therefore invalid. To support this argument, Plaintiffs note that La. R.S. 51:2231(A) created the Louisiana Commission on Human Rights and permitted local governments to create their own local human rights commissions with certain restrictions. One such restriction is that the local commissions must carry out only the policies contained in the enabling statute and the Civil Rights Act of 1964. La. R.S. 51:2237(1). Plaintiffs argue that one such policy is the

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[5] For a description of the pendant state law claims, *see* footnote 1 *supra,* and accompanying text.

State's definition of what constitutes a "public accommodation", as opposed to a bona fide private club which is not subject to the proscription against discrimination. As shown below, the state's policy as reflected in its definition of "public accommodation" is significantly different from and is in conflict with the definition contained in the City Ordinance in question.

Louisiana has defined "discriminatory practice" as an act of differentiation in the treatment of a person because of race, creed, color, religion, sex, age or natural origin. La. R.S. 51:2232(3). Furthermore, the state has declared that a "Place of public accommodation" means:

> any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public, or which is supported directly or indirectly by government funds. *However, a bona fide private club is not a place of public accommodation, resort, or amusement if its policies are determined solely by its members and its services are available only to its members and their bona fide guests.*

La. R.S. 51:2232(10) (emphasis added). Thus, Plaintiffs argue that the Ordinance is invalid because its stringent private club exception conflicts with the stated policy of the State, which is to exclude from coverage any private club so long as its policies are determined solely by its members and its facilities are available only to its members and their guests.

While the court believes that this "supersession" argument may well have merit, the court declines to decide this or any other pendant claim because the court has already found that the Ordinance cannot be constitutionally applied to these Plaintiff Clubs. Moreover, the court thinks that it would be imprudent to address any pendant state law claim because the parties only briefed one such claim and because the court believes that it should first decide an "as applied"' challenge, and only if that challenge fails should the court decide a much broader facial challenge. *Moore v. City of Kilgore, Texas*, 877 F.2d 364, 390 (5th Cir. 1989). As Plaintiffs were successful in their "as applied" constitutional challenge to the Ordinance, the court will not address the pendant state law claims, which are mostly facial challenges to the Ordinance.

IV. PERMANENT INJUNCTIONS

Plaintiffs seek, in addition to a declaration that Chapter 40C cannot be constitutionally applied to them, a permanent injunction (1) prohibiting Defendants from investigating any complaint of discrimination against any Plaintiff pursuant to Chapter 40C and (2) prohibiting Defendants from applying or attempting to apply Chapter 40C in any way to Plaintiffs. Defendants advance three main reasons why Plaintiffs are not entitled to permanent injunctive relief from the Ordinance. First, Defendants argue that genuine issues of material fact remain, but for the reasons stated above in Part II, this court finds this argument unpersuasive. Second, Defendants argue that a permanent injunction should not issue because Plaintiffs are bringing a facial challenge to the Ordinance and have not proven that the Ordinance could never be applied in a

constitutional manner. Likewise, the court has already rejected this argument and found that Plaintiffs are challenging this Ordinance on constitutional grounds only as it applies to them. Lastly, Defendants suggest that "any permanent injunction order would not be meaningful since Plaintiffs' corporate organizations, questionable overall membership sizes, and the location and layout of their facilities are capable of undergoing changes that could render them subject to some future application of Chapter 40C." *See* Memorandum in Opposition to Motion for Summary Judgment of the Boston, Louisiana and Stratford clubs at pp. 3-4. While this court agrees that it is conceivable that Plaintiff Clubs could undergo organizational changes that would cause them to come within the lawful reach of Chapter 40C, the court does not find that this is sufficient to prevent the issuance of a permanent injunction because a permanent injunction is not impervious to change.

Indeed, the prospective features of a permanent injunction are subject to vacation or modification if warranted by equitable principles in light of the change in circumstances. This principle is codified in Rule 60(b)(5) which provides for relief from a final judgment if "it is no longer equitable that the judgment should have prospective application."[6]

VI. CONCLUSION

Each Plaintiff Club has clearly demonstrated that it is a private club located at the most intimate end of the

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[6] For a discussion on the duration and modification of final injunctions, *see* 7 Moore's Federal Practice § 65.08.

qualitative continuum of personal relationships. As such, Plaintiffs have a First Amendment right to enter into and maintain certain intimate human relationships without undue state intrusion and a right not to have their private affairs made public by the government. Moreover, Plaintiffs have established a substantial likelihood that Defendants' application of Chapter 40C to Plaintiffs would expose them to public revelation of their membership lists, their members' tax returns, and complete descriptions of all club activities, which would ultimately have a chilling effect on their members' First Amendment rights. After reviewing the entire record, including the arguments of counsel, the court finds that Defendant should be permanently enjoined from investigating any complaints of discrimination against Plaintiffs pursuant to Chapter 40C and from applying or attempting to apply Chapter 40C to plaintiffs in any way because Defendants' application of the Ordinance to Plaintiffs, including public hearings where private and sensitive information will be sought, coupled with the inevitable attendant publicity, would unduly burden Plaintiffs' First Amendment rights. Accordingly,

IT IS ORDERED that the Motions for Summary Judgment filed by Plaintiffs, the Louisiana Debating and Literary Association, the Stratford Club, the Boston Club of New Orleans, and the Pickwick Club, be and are herby GRANTED, DECLARING that application of Chapter 40C of the Code of the City of New Orleans to Plaintiffs violates their rights under the United States Constitution.

IT IS FURTHER ORDERED that Defendants, their officers, officials, agents, employees, and successors be and are herby PERMANENTLY ENJOINED from in-

vestigating any complaint of discrimination against the Louisiana Debating and Literary Association, the Stratford Club, the Boston Club of New Orleans, and the Pickwick Club pursuant to Chapter 40C of the Code of the City of New Orleans, and from applying or attempting to apply Chapter 40C of the Code of the City of New Orleans in anyway to the Louisiana Debating and Literary Association, the Stratford Club, the Boston Club of New Orleans, and the Pickwick Club.

IT IS FURTHER ORDERED that any of the parties hereto may apply for other or further action or relief, and this court hereby RETAINS JURISDICTION of this matter for the purpose of any order or direction or modification of this decree, or any supplemental decree that it may deem at any time to be proper in relation to the subject matter in controversy herein.

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APPENDIX ITEM 3

Pgs. 562.107 - 562-140

CHAPTER 40C

NEW ORLEANS HUMAN RELATIONS COMMISSION.[1]

ARTICLE I. COMMISSION;CREATION AND STRUCTURE.

ARTICLE II. CITY POLICY AND PROCEDURES AGAINST DISCRIMINATION.

ARTICLE III. DISCRIMINATION IN PUBLIC ACCOMMODATIONS AND CLUBS.

ARTICLE IV. DISCRIMINATION IN PUBLIC ACCOMMODATIONS, EMPLOYMENT, AND REAL ESTATE AND HOUSING.

ARTICLE I. COMMISSION;CREATION AND STRUCTURE

Section 40C-1. Authorization.

(a) It is the intent of this article to authorize creation by the Mayor of a new bureau, to be known as the Human Relations Commission, which shall be authorized to exist

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[1] Section 1 of M.C.S., Ord. No. 14,984, adopted Dec. 19, 1991, called for the addition of a Chapter 40A. Inasmuch as provisions already existed in this Code as Ch. 40A, Municipal Service Charge, new provisions adopted by Ord. No. 14, 984 have been included herein as Ch. 40C at the editor's discretion.

and act for the city, as provided in this article, with the advice of an Advisory Committee on Human Relations constituted as provided herein. It is the intent of this article to exercise the city's rights under Article VI, Section 6 of the Constitution; and the Council declares that said bureau, acting with the advice of said committee, shall constitute the city's human rights commission under state law. The term "commission," as used in this article, refers to said bureau acting with the advice of said committee; and the term "committee" refers to said committee acting as the designated advisor to said bureau. The Council finds that the use of a bureau within an existing administration unit, advised by a citizens' advisory committee, to serve as a city human rights commission will achieve the goals of independence of judgment and participation of citizens representing diverse interest and community groups while at the same time observing the Home Rule Charter policy against the proliferation of administratively discrete agencies.

(b) Subject to the limitation set forth in Subsection (c), the Mayor is hereby authorized to create, within one of the offices, departments or boards created or recognized by the Home Rule Charter, a bureau to be known as the New Orleans Human Relations Commission.

(c) The authorization granted in Subsection (b) shall be effective only during the period or periods of existence of an advisory committee on human relations appointed pursuant to Section 40C-2.

(d) The New Orleans Human Relations Commission shall be headed by a fulltime executive director, and may

employ additional staff in the manner provided by applicable law. Except as may otherwise be provided in applicable law, the Executive Director shall be appointed only after consultation with the Advisory Committee on Human Relations. (M.C.S., Ord. No. 14,910, § 1, 11-26-91; M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-2. Advisory committee on human relations.

(a) Pursuant to the provisions of Section 4-104 of the Home Rule Charter, the Mayor, or with the consent of the Mayor, the head of any department or any board to which the New Orleans Human Relations Commission shall have been assigned, may appoint an advisory committee to be known as the Advisory Committee on Human Relations. In order for its existence to be sufficient to give effect to the authorization granted by Section 40C-1(a), the Advisory Committee on Human Relations must be organized in accordance with Subsection (b) of this section.

(b) The Advisory Committee shall be composed of eighteen (18) members, to be appointed as follows: Seven (7) members each appointed as directed by a different member of the City Council, two (2) members appointed at the sole discretion of the Mayor, and nine (9) members appointed from a list of eighteen (18) submitted by a nominating committee composed of the Presidents of Xavier University, Dillard University, Tulane University, Loyola University, Delgado Community College, and Our Lady of the Holy Cross College, and the Chancellors of the University of New Orleans and Southern University in New Orleans.

(c) The nominating committee referred to in Subsection (b) shall be convened by the Mayor on the earliest practical date and shall conduct its own affairs as a citizens' advisory committee supported by the staff of the Office of the Mayor. Before making its nominations, the nominating committee shall solicit the recommendations of civic, professional, social, advocacy, trade, labor, civil rights, and other organizations, including but not necessarily limited to, the Chamber/New Orleans and the River Region, the Roman Catholic Archdiocese of New Orleans, the Black Economic Development Council, the local Anti-Defamation League of B'nai, the Interdenominational Ministerial Alliance, the local American Federation of Labor/Congress of Industrial Organizations, and the local Federation of Churches, and shall receive and consider the timely recommendations of any other persons who choose to submit recommendations.

(d) The appointment of a member of the Advisory Committee shall not become effective until it has been confirmed by the City Council. Members of the Committee shall serve a term of one (1) year and shall serve without compensation.

(e) A simple majority of the members of the Advisory Committee shall institute a quorum for the purposes of doing business and of formal compliance with the Open Meetings Law, unless otherwise provided by state Law. A majority vote shall be required for Advisory Committee action. The Executive Director of the Human Relations Commission shall have a voice, but not vote, in meetings of the Advisory Committee.

(f) The Mayor, the Council and the nominating committee shall exercise their best efforts to ensure that the members of the advisory committee are appointed and confirmed by the earliest possible date. Within one (1) month of its appointment, the Committee shall meet, at the call of the Mayor, and shall designate one of its members as Chairperson and one as Vice-Chairperson. The Vice-Chairperson shall act as Chairperson in the absence or disability of the Chairperson or in the event of a vacancy in that office. Any vacancy in the Committee shall not affect its powers and shall be filled in the same manner and subject to the same limitations as to the particular appointing authority that governed the original appointment.

(g) Any member may be removed by the Committee with the concurrence of the Mayor and a majority of the City Council for unexcused failure to attend meetings or neglect of duties or for any cause sufficient to warrant removal of a city board member. (M.C.S., Ord. No. 14,910, § 1, 11-26-91; M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-3. Duties of the commission.

The Commission, with the advice of, and in close cooperation with the Advisory Committee shall:

(1) Study and (in such manner and subject to such screening procedures as may be provided in its rules) collect information concerning written complaints, signed by one (1) or more complainants, that citizens of the City of New Orleans are being or have been deprived of rights guaranteed to them by the United States or Louisiana Constitution or the laws

of the State of Louisiana or the City of New Orleans, on account of color, race, creed, religion, culture, ancestry or national origin, sex, sexual orientation, age, physical condition or disability.

(2) Study and collect information concerning legal developments constituting discrimination or denial of equal protection of the laws under the United States or Louisiana Constitution because of color, race, creed, religion, culture, ancestry, or national origin, sex, sexual orientation, age, physical condition or disability, or the inadequate or partial administration of justice.

(3) Appraise the laws and policies of the Federal Government, the State of Louisiana, and the City of New Orleans, with respect to discrimination or denials of equal protection of the laws under the United States or Louisiana Constitution because of color, race, creed, religion, culture, ancestry or national origin, sex, sexual orientation, age, physical condition or disability, or the inadequate or partial administration of justice.

(4) Collect and report information and establish forums and other means for dialogue concerning the social and economic progress and development of all citizens of the City of New Orleans.

(5) Foster mutual understanding and respect among all economic, social, religious, cultural and ethnic groups in the city.

(6) Assist in maintaining the integrity of the electoral process with respect to voting rights.

(7) Cooperate with Federal, State, and City agencies in their efforts to curb discriminatory practices.

(8) Seek grants and donations on behalf of the city from foundations and others for the purpose of carrying out its functions, subject to the approval of the Council and the Mayor. The acceptance of such grants and donations by the city shall be subject to the provisions of Section 5-402 of the City Charter.

(9) Report to the City Council and the Mayor on an annual basis concerning each of its duties. (M.C.S., Ord. No. 14,910, § 1, 1-26-91; Ord. No. M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-4. Reserved.

Section 40C-5. Action by commission.

(a) The Human Relations Commission shall act by and through its Executive Director. In all matters, however, the Executive Director shall act strictly in conformity with the recommendations of the Advisory Committee on Human Relations.

(b) The Human Relations Commission may act contrary to the recommendations of the Advisory Commission on Human Relations only if:

(1) The City Attorney has rendered a written opinion that strict conformity with said recommendations

would be unlawful, and the Mayor has certified his acceptance of said opinion in a writing directed to the members of the Council; or

(2) The Mayor has in writing directed to the Commission and distributed to the members of the Council, suspended the obligation to act in such conformity until the adjournment of the next regular Council meeting; or

(3) The Council by two-thirds (⅔) vote has expressly overruled said recommendations of the Advisory Committee. (M.C.S., Ord. No. 14,910, § 1, 11-26-91; M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-6. Miscellaneous provisions.

(a) All city agencies and departments shall cooperate fully with the Commission and Advisory Committee to the end that they may effectively carry out their functions and duties.

(b) The Advisory Committee may, for the purpose of carrying out the provisions of this chapter, hold such hearings and act at such times and places as are deemed advisable. Subpoenas for the attendance and testimony of witnesses or the production of written or other matter may be issued in accordance with applicable state or city law. The holding of hearings by the Advisory Committee or the appointment of a subcommittee or a hearing examiner to hold hearings pursuant to this paragraph, must be approved by a majority of the members present at a meeting at which a quorum is present.

(c) Without limiting the generality of the foregoing, the Executive Director or his deputies shall have the power and authority unless otherwise provided in applicable law, to administer oaths or take statements of witnesses with regard to the aformentioned hearings.

(d) The Advisory Committee shall have the power to create subcommittees; and the Commission with the advice of the Committee shall have the power to make such rules and regulations as are convenient or necessary to carry out the purposes of this chapter in the manner provided in the City Charter.

(e) All meetings of the Advisory Committee and its subcommittees shall be subject to the Open Meetings Law of the State of Louisiana. (M.C.S., Ord. No. 14,910, § 1, 11-26-91; M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-7. Report on hearings.

The Commission, after the completion of any hearing, shall make a report in writing to the Mayor and City Council setting forth the facts found and its recommendations or decision, as the case may be. At any hearing before the Commission or Committee a witness shall have the right to be advised by counsel present during such hearings. (M.C.S., Ord. No. 14,910, § 1, 11-26-91; M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-8. Meetings.

(a) The Advisory Committee shall meet for regular meetings at least once every two (2) months at such time

and place as shall be fixed by the Committee. Special meetings may be called by the Executive Director, by the Chairperson or, in his absence, by the Vice-Chairperson, and shall be called by the Executive Director on the written request of eight (8) or more members of the committee. All such requests and all notices of meetings shall state the purpose or purposes for which such special meeting is to be called and shall be filed with the Chairperson and served upon all members upon whom service can reasonably be made at least twenty-four (24) hours before the time of the special meeting.

(b) Such a request and call for a special meeting shall be read at the meeting and entered in the minutes, and no business shall be transacted except that stated in the request for such special meeting.

(c) The Executive Director shall prepare the agenda and give all notices required for each meeting. The Advisory Committee shall keep minutes of meetings and shall establish its own rules of order or adopt Robert's Rules of Order for the conduct of meetings. (M.C.S., Ord. No. 14,910, § 1, 11-26-91; M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40D-9. Assistance of mayor and executive branch.

The Commission or Committee may request and receive from the Mayor the use of such employees of his office as may be necessary for the proper conduct of business. The Department of Law shall designate a legal adviser for the Commission and Advisory Committee, who shall have

a voice but no vote in all matters. The services of all other departments of the City of New Orleans may be available to the Committee upon its request to the Mayor for such services. Information in the possession of any department, board, or agency of the City of New Orleans shall be furnished to the Commission or Committee upon request, and to the extent permitted by law, subject to any limitations upon its ability and capacity to furnish the information. Upon the refusal by any director or head of any department, board, or agency of the city to furnish any information which has been requested, the matter shall be referred to the Mayor, who shall determine promptly whether such information shall be furnished to the Commission and Committee; and the decision of the Mayor shall be final. The Department of Property Management is authorized to allocate adequate office space and to provide necessary facilities for the Commission, and shall provide a suitable meeting place for the Advisory Committee. (M.C.S., Ord. No. 14,910, § 1, 11-26-91; M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Sections 40C-10—40C-49. Reserved.

ARTICLE II. CITY POLICY AND PROCEDURES AGAINST DISCRIMINATION.

Section 40C-50. Policy and procedures.

In the City of New Orleans with its great cosmopolitan population consisting of large numbers of people of every race, color, creed, religion, age, physical condition, national origin and ancestry, many of them with disabilities, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants

than the existence of groups prejudiced against one another and antagonistic to each other because of differences of race, color, sex, creed, religion, age, national origin or ancestry, or physical condition or disability or sexual orientation. The Council hereby finds and declares that prejudice, intolerance, bigotry, and discrimination and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state. The New Orleans Human Relations Commission as created by Article I of this chapter is designated as an instrument of the city's power to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in housing accommodations and in commercial space because of race, creed, religion, color, sex, age, sexual orientation, national origin, ancestry, or physical condition or disability whenever such discrimination is prohibited by provisions of this chapter or other city law; and said commission is hereby designated as the local Human Rights Commission for this city and is given such jurisdiction and power for such purposes as is conferred upon or authorized to a local Human Rights Commission under applicable state law. Except as otherwise provided in the City Charter, this Code, or applicable state law, the Commission is hereby authorized to enforce and administer any and all city ordinances prohibiting discrimination in public accommodations or in other areas, including but not limited to, the provisions of this chapter.(M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-51. Complaints; investigations.

The New Orleans Human Relations Commission shall receive, investigate and pass upon complaints and may initiate its own investigation of:

(a) Racial, religious and ethnic group tensions, prejudice, intolerance, bigotry and disorder occasioned thereby.

(b) Discrimination againsst any person, group of persons, organization or corporation, practiced by private persons, associations, or corporations, and, after consultation with the Mayor, by city officials or city agencies, Upon its own motion, the Commission may make, sign and file complaints alleging violations of any provision of this chapter or any other law prohibiting discrimination.(M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-52. Club membership list.

The Commission shall not require the production of names from a general membership list of any club that is a place of public accommodation. (M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-53. Discriminatory acts and practices prohibited.

(a) Any person claiming to be aggrieved by an unlawful discriminatory practice or other act prohibited by this chapter may, by himself or herself or through an attorney-at-large, make, sign and file with the Commission a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice or act complained of and which shall set forth the particulars thereof and contain such other information as may be required by the Commission. The Commission through its Executive Director may, in like manner, make, sign and file such a complaint. In connection with the filing of such a complaint, the Commission

is authorized to take proof, issue subpoenas and administer oaths in the manner provided in all applicable administrative laws, regulations and rules. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this chapter, may file with the Commission a verified complaint asking for assistance by conciliation or other remedial action.

(b) After the filing of any complaint, the Commission shall make prompt investigation in connection therewith. If the Commission shall determine after such investigation that probable cause does not exist for crediting the allegations of the complaint that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in a prohibited or unlawful discriminatory practice, the Commission shall issue and cause to be served on the complainant an order dismissing such allegation of said complaint as to such respondent. The complainant may, within thirty (30) days of such service, apply to the Council for consideration of such action of the Commission. Upon such application, the Council may review such action and determine whether there is probable cause to credit the allegations of the complaint and accordingly shall enter an order affirming, reversing or modifying the determination of the Commission or remanding the matter for further investigation and action, a copy of which order shall be served upon the complainant.

(c) If the Commission, after investigation, shall determine that there is probable cause to credit the allegations of the complaint, or if the Council after consideration, shall determine that there is such probable cause, the Commission shall immediately endeavor to eliminate such prohibited acts or unlawful discriminatory practice by pro-

ceeding in the following manner:

(1) If in the judgement of the Commission circumstances so warrant, it may endeavor to eliminate such prohibited or unlawful discriminatory practice by conference, conciliation and persuasion, resulting in a conciliation agreement. The terms of such conciliation agreement shall include provisions requiring the respondent to refrain from the Commission of unlawful discriminatory practices in the future and may contain such further provisions as may be agree upon by the Commission and respondent, including a provision for the entry in court of a consent decree embodying the terms of the conciliation agreement.

(2) In case of failure to eliminate the unlawful discriminatory practice complained of, or in advance thereof as determined by the Commission, it shall cause to be issued and served in the name of the Commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer the charges of such complaint at a hearing before a hearing officer designated by the Executive Director, at a time and place to be fixed by the Executive Director, and specified in such notice. The place of any such hearing shall be the office of the Commission or such other place as may be designated in the notice. The case in support of the complaint shall be presented before the Commission by the Department of Law or another representative designated by the Executive Director.

Endeavors at conciliation by the Commission shall not be received in evidence. The respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. The complainant shall have the power to make reasonable amendments of the complaint, and the repondent shall have like power to make reasonable amendments of his or her answer. The Commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and shall be recorded in an electronically stored video and/or audio format and may be transcribed at the expense of any person who desires a transcript. Any party may cause the hearing to be recorded by a certified court reporter at his or her own expense.

(3) If, upon all the evidence at the hearing, the Commission, or such hearing officer as may have been designated, shall find that a respondent has engaged in any unlawful discriminatory practice prohibited in this Code, the Commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including (but not limited to) restoration to membership in any respondent organization, admission to or participation in a program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, evaluating applications for membership in a club

that is not distinctly private without discrimination based on race, creed, religion, color, national origin, ancestry, sex, physical condition, sexual orientation or disability, and including a requirement for report of the manner of compliance. If, upon all the evidence, the Commission shall find that a respondent has not engaged in any such unlawful discriminatory practice, the Commission shall state its finding of fact and shall issue and cause to be served on the complainant an order dismissing the complaint as to such respondent.

(d) Any complaint filed pursuant to this section must be so filed within one (1) year after the alleged act of discrimination.

(e) Whenever a complaint has been filed against any carnival krewe, parading carnival organization or other organization organized or existing for the primary or dominant purpose of observing or participating in the carnival season, the respondent may submit an affidavit of its captain or other officer of commensurate rank, attesting or affirming that the respondent has no written or unwritten provision in its charter, by-laws, rules, regulations or policies which calls for the refusal, withholding or denying of membership, or any of the services, accommodations, advantages, facilities or privileges offered by the respondent to members or others, because of race, color, creed, religion, national origin, sexual orientation or ancestry, or which unreasonable calls for such discrimination on the basis of age, sex, physical condition or disability and that it and its members will, except as otherwise authorized by Section 40C-111, treat all proposals for membership in a non-discriminatory manner in accordance with the procedures

contained in the krewe's by-laws and regulations. Upon receipt of such writing, the Commission shall issue and cause to be served on the complainant an order dismissing such complaint and no further proceeding shall be had by way of hearing or otherwise before the Director or Commission or by appeal to the Council.

(f) At any time after the filing of a complaint alleging an unlawful discriminatory practice under this chapter, if the Commission determines that the respondent is doing or procuring to be done any act tending or render ineffectual any order the Commission has entered or may thereafter enter in such proceeding, the Commission may authorize the Department of Law to apply in the name of the city and Commission to any court of competent jurisdiction and proper venue, for an order requiring the respondents or any of them to show cause why they should not be enjoined from vitiating or violating the restraining order and shall be served in the manner provided therein.(M.C.S., Ord. No. 14,984, § 1, 12-19-91; M.C.S., Ord. No. 15-917, § 1, 5-7-92.)

Section 40C-54. Judicial review and enforcement.

Subject to applicable state law, any complainant, respondent or other person aggrieved by any infringement of an order of the Commission may obtain an order of court for its enforcement. Such proceeding shall be brought in a court of proper venue and competent jurisdiction.(M.C.S., Ord. No. 14,984, § 1, 12-19-91; M.C.S., Ord. No. 15,197, § 7, 5-7-92.)

Section 40C-55. Penal provision for obstruction.

Any person, employer, labor organization or employment agency, who or which shall willfully resist, prevent, impede or interfere with the Commission or any of its agents or representatives in the performance of duty under this chapter, or shall willfully violate an order of the Commission or any of its members or representatives in the Performance of duty under this chapter, shall be guilty of a misdemeanor and shall be punished by imprisonment for not more than five (5) months, or by a fine of not more than three hundred dollars ($300,00), or by both such imprisonment and such fine; provided that procedure for the review of the order shall not be deemed to be such willful conduct, (M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-56. Construction.

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal, supersede, or impair any of the provisions of any civil rights law or any other law of this city or state relating to discrimination because of race, creed, religion, color, national origin or ancestry, physical condition or disability; but as to acts declared unlawful by this chapter, the procedure provided in this article shall, while pending, be exclusive of all other civil procedures created by city law (but not exclusive of misdemeanor criminal law procedures or procedures under state or federal law); and the final determination therein shall exclude any other civil action, or remedy created by city law, based on the same grievance of the person concerned. If such person institutes any such

action or seeks any such remedy based on such grievance without first resorting to the procedure provided in this article, he or she may not subsequently resort to the procedure set forth herein.(M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-57. Criminal penalties, generally.

(a) Unless it is expressly provided otherwise elsewhere in a particular section of this chapter, any person who does anything prohibited or fails to do anything required by this chapter shall be guilty of a misdemeanor and upon conviction thereof, shall be sentenced to a term of imprisonment not to exceed five (5) months, or to a fine not to exceed three hundred dollars ($300.00), or to both such imprisonment and such fine.

(b) Unless required to do so by applicable law or by the Court, the City Attorney shall not prosecute an offense this under section during the pendency under Article II of this chapter of civil proceedings concerning the same complainant and respondent and the same grievance before the Human Relations Commission.(M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Sections 40C-58—40C-100. Reserved.

ARTICLE III. DISCRIMINATION IN PUBLIC ACCOMMODATIONS AND CLUBS.

SECTION 40C-101. Discrimination in public.

Accommodations; definition. For the purposes of

this article, the following words and phrases shall have the meanings hereinafter assigned unless a particular context clearly indicates otherwise:

Benevolent or fraternal lodge. The term "benevolent or fraternal lodge" shall mean a society or voluntary association organized and carried on for the mutual aid and benefit of its members, not for profit, which ordinarily has a lodge system a ritualistic form of work, and a representative government, and an emphasis on the common interests and bonds of friendship among its members. The term shall not include any entity or associated club organized or existing for the dominant purpose of participating in or observing the Carnival Season.

Commission. The term "Commission," unless a different meaning clearly appears from the context, means the New Orleans Human Relations Commission, the creation of which is authorized by this chapter.

Director. For the purposes of this article, "Director" shall mean the Executive Director of the New Orleans Human Relations Commission, if such a body has been established, or in the absence thereof any officer or employee of the city designated by law to implement the provisions of this article, or, if no applicable law makes such a designation, designated by the Mayor in a writing filed with the Clerk of Council.

Disability. The term "disability" refers to the status or defining characteristic of a "disabled" or "handicapped" person; the terms "disabled person" or "handicapped person" mean any person who has or had a physical or mental impairment that substantially limits one or more major life activities, and who has a record of such an impairment or who is perceived to have such an impairment.

Discrimination; to discriminate. Any difference in the treatment of a person, including exclusion or segregation, because of race, color, creed, religion, sex, sexual orientation, national origin, ancestry, age, physical condition, or disability.

Has a record of such an impairment. The term "has a record of such an impairment" means has a history of, or has been classified as having a mental or physical impairment that substantially limits one or more major life activities.

Major life activities. The term "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Person: An association, partnership, corporation, or other legal entity or a natural person. As applied to a partnership or other entity, "person" includes its members, and as applied to a corporation, "person" included its officers.

Public accommodation, resort, or amusment includes:

(1) Any place or means of transportation which is open to, accepts or solicits the patronage of the general public or offers goods or services to the general public, including all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accomodation of those seeking health, recreation or rest; or restaurants, or eating houses, or any place where food is sold for consumption on the premises; takeout restaurants;

buffets, saloons, barrooms, or any store, park or enclosure where alcoholic beverages are sold; ice cream parlors, confectioneries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption; retail stores and establishments dealing with goods or services of any kind; clinics, hospitals, bathhouses, swimming pools, laundries and all other cleaning establishments; barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, casinos, betting parlors, bingo or other charitable gaming halls, skating rinks, amusement and recreation parks, video arcades, amusement parlors, trailer camps, resort camps, fairs, bowling alleys golf courses, gymnasiums, marinas and public boating facilities, shooting galleries, billiard and pool parlors; massage establishments and health clubs; garages, taxicabs, limousines and all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour services, agencies, or bureaus; public halls and public elevators of buildings and structures occupied by two (2) or more tenants, or by the owners and one (1) or more tenants.

(2) Any institution, club, or place of accommodation which:

a. has more than seventy-five (75) members.

b. either:

1. regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages, directly or indirectly; either from or on behalf of nonmembers or members for or in the direct or indirect furtherance of trade or business or from or on behalf of any persons who claim such payment as a business expense for tax purposes, or,

2. has, within the preceding calendar year, received a permit pursuant to Section 12A-20 of this Code to parade during the defined carnival parade season as set forth, in Section 12A-4 of this Code while having within its charter, by-laws, rules regulations or written or unwritten policies any provision which calls for the refusal, withholding or denying of membership or of any of the services, accommodations, advantages, facilities or privileges offered by the institution, club, or place of accommodation to members or others because of race, color, creed, religion, national origin, sexual orientation, or ancestry, or which unreasonably calls for such discrimination because of physicial condition, or disability, and

c. which either:

1. provides regular meal service, or

2. uses for its activities, on a recurring basis, the public streets, ways or places or publicly owned or operated facilities under authority of a

permit, license, franchise or priviledge granted by a public body, under circumstances such that, as a result of said activities in or on publicly owned or operated property, expenses are incurred by a public body which are not wholly recovered in payments to the public body by the institution, club, or place of accommodation. The rental of the Municipal Auditorium by a nonprofit corporation, at the "full-price" rates as established by the Chief Administrative Officer, is hereby declared to be a situation in which the expenses incurred by the city are wholly recovered by payment as to the city by the nonprofit corporation. It shall by the duty of the Chief Administrative Officer to ensure that the payments for rental of the Municipal Auditorium by a nonprofit corporation for events which are not open to the public at-large are sufficient to wholly recover all expenses incurred by the City of New Orleans.

(3) "Public accommodation," "resort" or "amusement" is expressly deemed not to include, provided the accommodation's facilities, services, advantages and privileges are restricted to members and their guests:

a. Any bona fide private club, which:

1. does not have more than seventy-five (75) members;
2. which neither:

(a) regularly receives payments for dues, fees, use of space, facilities, services, meals or beverages, directly or indirectly, either from or on behalf of non-members or members for or in the direct or indirect furtherance of trade or business or from any persons who claim such payment as a business expense for tax purposes, nor

(b) has, within the preceding calendar year, received a permit pursuant to Section 12A-20 of this Code to parade during the Carnival Parade Season as set forth in Section 12A-4 of the Code; or

3. which neither:

(a) provides regular meal service, nor

(b) uses for its activities, on a recurring basis, the public streets, ways or places or publicly-owned or operated facilities in the manner and under the circumstances hereinabove described.

b. Any bona fide benevolent or fraternal lodge or religious or political organization, or any organization formed for the predominant purpose of advocacy of a cause or viewpoint which by the nature of its purpose excludes from its membership those to whom the advocated cause or viewpoint is inimical.

Regular meal service. The term, "regular meal service" shall mean the availability of meals on a predictable basis as to time and place and on premises owned or controlled by a public accommodation, resort, or amusement, as defined herein, where such meals are prepared and/or served by employees of said public accommodation or its lessee, contractors, licensee or agent, for consumption on said premises by members and/or guests.

"Regular meal service" shall not include meals provided as hospitality by a member in a private home or public restaurant, nor the sale of commercially-packaged snack items, nor infrequent meals such as banquets or ceremonial breakfasts held to celebrate special occasions.

Sexual orientation. The term "sexual orientation" is defined as heterosexuality, homosexuality or bisexuality for purposes of this chapter.(M.C.S., Ord. No. 14,984, § 1, 12-19-91; M.C.S., Ord. No. 15,197, § 2, 5-7-92; M.C.S., Ord. No. 15,199, § 1, 5-21-92.)

Section 40C-102. Unlawful practices.

(a) It shall be an unlawful discriminatory practice and a misdemeanor for any public accommodation, resort, or amusement, as defined in Section 40C-101 or for any person who is the owner, lessee, proprietor, manager, superintendent, employee, officer or agent thereof:

(1) To discriminate against any person, either directly or indirectly, by refusing, withholding, or denying to such person any of the services, accommodations, advantages, facilities or privileges offered by the

public accommodation, resort or amusement, by placing or attempting to place any person in a separate class of customers, patrons, members, guests or usere or in a separate section or area of the premises or facilities of the public accommodation, resort or amusement because of race, color, creed, religion, national origin, ancestry, or unreasonably because of age, sex, sexual orientation, physical condition or disability.

(2) To publish, circulate, issue, display, post or mail either directly or indirectly any written or printed communication, notice or advertisement to the effect that any of the services, accommodations, advantages, facilities or privileges of any public accommodation, resort or amusement will be refused, withheld, or denied to any person on account of race, color, creed, religion, national origin, ancestry, or unreasonably on account of sex, sexual orientation, age, physical condition or disability, or that the patronage of any person of a particular race, color, creed, religion, sex, sexual orientation, national origin ancestry, age, physical condition or disability, is unwelcome, objectionable or not acceptable, desired or solicited, or that any person is required or requested to use a separate section or area of the premises or facilities of the public accommodations, resort or amusement, because of race, color, creed, religion, national origin, ancestry, or unreasonably because of sex, sexual orientation, age, physical condition or disability.

(3) to aid, abet, incite, counsel or coerce the doing of

any act declared herein to be unlawful or to prevent any person from complying with this article or any rule, regulation or order issued pursuant there to.

(b) The provisions of this section shall not prohibit to the placement of persons in a separate restroom, bath, locker room, shower, physical or medical examination or treatment facility, dressing area, or dormitory or sleeping room used by more than one (1) party of persons at a time, if such placement is reasonable and based on the person's sex or sexual orientation. The provisions of this section shall not apply, with respect to sex, sexual orientation, physical condition, or disability, to places of public accommodation, resort or amusement where the Council or the Commission grants an exemption based on bona fide considerations of public policy. Any place of accommodation which is required as a result of this section to construct or reconstruct a locker room, shower, or other facilities for the use of members of a particular sex or similar group or for the use of the mobility impaired shall be allowed until the first anniversary of the effective date of [Ordinance Number 14,984,] the ordinance by which this article is adopted, to complete such work, and prior to such date shall not be found to be in violation of the provisions of this section which apply to such facilities with regard to discrimination on account of sex or a mobility-impairment disability. The Director, for good cause shown, may grant an extension not to exceed an additional ninety (90) days after the date allowed such place of accommodation to complete such work.

(c) It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section

applies to retaliate or discriminate against any person because such person has opposed any practices forbidden under this chapter or such person filed a complaint, testified or assisted in any proceeding under this chapter.

(d) It shall be an unlawful discriminatory practice for any party to a conciliation agreement made pursuant to Article II of this chapter to violate the terms of this chapter to violate the terms of such agreement.

(e) Nothing contained in this section shall be construed to bar any religious or denominational institution or organization or any organization, operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religious or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

(f) No act or practice shall be construed as an unlawful discriminatory practice under this chapter if that act or practice is expressly authorized by valid and presemptive state or federal law. Nothing in this chapter shall be construed as requiring or as authorizing a public accommodation to require a person with a particular physical condition or disability to accept any special facilities or treatment offered as a special accommodation for persons with such a condition or disability if such person declines to accept such special accommodation. It shall be an unlawful discriminatory practice for any person to refuse, withhold, or deny any service, accommodation

because the person with the particular physical condition or disability had declined to accept such a special accommodation; provided, however, that a person with a mobility impairment that requires the use of a wheelchair or similar device may be required to accept a special accommodation if refusal to do so would necessarily result in a violation of fire code or similar public safety regulations. (M.C.S., Ord. No. 14,984, § 1, 12-19-91; M.C.S., Ord. No. 15,197, § 3, 5-7-92.)

Section 40C-103. Distinctly private entities.

(a) The Director shall maintain a registry of institutions, clubs or places of accommodation certified by him or her to be distinctly private in character. The provisions of Section 40C-102 shall not apply to any institution, club or accommodation included in the registry for so long as it is so included. Any certification that a club or institution is distinctly private in character shall be valid for a period of three (3) years from the date of the initial certification, but may be renewed upon application of the registrant for successive additional periods of three (3) years.

(b) The Director, upon application of any institution, club or accommodation shall certify an applicant for inclusion in the registry if the applicant proves, by a preponderance of the evidence, that it is distinctly private in character. A club or institution is distinctly private in character if either:

(1)a. Its services, accommodations, advantages, facilities, or privileges are not offered or available to the public or to a wide sector of the public exclusive of a class or classes

discrimination against whom is prohibited by this article;

b. it is not an agent of the state or its creatures, agencies or subdivisions, and its activities do not constitute state action;

c. it does not advertise for or engage in general solicitation to attract potential customers, patrons, or members;

d. it does not fulfill a vital community role affected with public interest;

e. its activities are not subsidized directly or indirectly by public funds, nor does it otherwise receive governmental support;

f. it does not exist or operate for commercial or business purposes;

g. it generally denies its services, accommodations, advantages, and privileges and participation in its activities, meetings, and social functions to all but members and their guests;

h. its membership is of moderate size, and it is not connected with a larger institution, club or accommodation that is a public accommodation;

i. its organizers had the intention of constituting a private institution, club, or accommodation;

j. its organizational structure has not been altered since passage of the Civil Rights Act of 1964 in an attempt to avoid the applicabili-

ty of that act, or since the date of the effectiveness of this chapter, in an effort to avoid the applicability of this article;

k. its members have an nexus of common interest;

l. its membership policies include an element of exclusiveness based on one (1) or more criteria other than membership in a class against whom discrimination is prohibited by this article; and

m. it does not offer or constitute facilities, sponsor activities, or create an environment where business deals are often made and personal contacts valuable for business purposes, employment, and professional advancement are formed; or

(2) its character as an institution, club, or association is such that, under the constitutional doctrines of freedom of association (including expressive association) and privacy prevailing in the law at the time of the hearing, the Constitution of this state or of the United States requires that Section 40C-102 not be applied against it.

(c) (1) An application to be certified for inclusion in the registry shall be in writing on a form prepared by the Director and shall include all information reasonably determined by the Director to be necessary or useful to consideration of the application.

(2) Each application shall be signed by a duly authorized officer or agent of the applicant who shall attest by oath or affirmation to the truth of its contents.

(d) Upon receipt of an application, the Director shall assign it a date and time for public hearings which shall be not sooner than four (4) weeks and not later than six (6) weeks from the date of receipt of the application. Notice of the application and the hearing, in a standard form which shall be prescribed by the Director, shall be published in the Official Journal, by the applicant and at its expense, at least three (3) times, so that the first publication shall be not more than twenty-eight (28) and not less than twenty-one (21) days and so that the last publication shall be not more than seven (7) and not less than two (2) days prior to the hearing. Any interested person may appear at the hearing to support or oppose the application, subject to such reasonable regulations and time limits as the Director, or his designee as presiding officer, may prescribe. The hearing shall be conducted in accordance with the provisions of the Administrative Procedures Act with respect to the rules of evidence.

(e) Within seven (7) days of the conclusion of the hearing, the Director shall notify the applicant and any interested person who has requested such notice of his or her determination to grant or deny certification for inclusion in the registry. The decision of the Director shall be in writing, shall state the reasons for his or her determination, and shall become effective as a certification seven (7) days after it is assigned by the Director.

(f) On his or her own motion, or upon the written

complaint of any interested person, the Director may initiate proceedings for the removal of any institution, club or accommodation from the registry. The motion or complaint by which removal proceedings are commenced shall be in a verified writing and shall set forth facts sufficient to show that the respondent institution, club or accommodation is not distinctly private in character. The motion or complaint shall be signed by the complainant or a duly-authorized agent of the complainant who shall attest by oath or affirmation to the truth of its contents.

(g) Upon the receipt of filing in the office of the Director of such a motion or complaint, the Director shall assign it a date and time for public hearings which shall be not sooner than four (4) weeks and not later than six (6) weeks from the date of receipt of the complaint. Notice of the complaint and the hearing, in a standard form which shall be prescribed by the Director, shall be published in the Official Journal, by the complainant and at its expense, at least three (3) times, so that the first publication shall be not more than twenty-eight (28) and not less than twenty-one (21) days and so that the last publication shall be not more than seven (7) and not less than two (2) days prior to the hearing. Any interested person may appear at the hearing to support or oppose the complaint, subject to such reasonable regulations and time limits as the Director, or his designee as presiding officer, may prescribe. The hearing shall be conducted in accordance with the provisions of Administrative Procedures Act with respect to the rules of evidence. Within seven (7) days of the conclusion of the hearing, the Director shall notify the complainant, and any interested person who has requested such notice, of his or her determination to grant or deny continued certification

for inclusion in the registry. The decision of the Director shall be in writing, shall state the reasons for his or her determination, and shall become effective seven (7) days after it is signed by the Director. If a decision to deny continued certification becomes effective, the respondent shall be removed from the registry immediately.

(h) An institution, club or accommodation may at any time apply or reapply to be certified for inclusion in the registry notwithstanding the fact that it may have been denied certification or been removed from the registry in the past. A motion or complaint seeking removal of a club or institution from the registry shall be denied without a hearing by the Director if a motion or complaint initiated by the same person and setting forth the same or substantially similar facts has been denied within the past six (6) months. (M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-104. Reserved.[2]

Section 40C-105. Exclusion based on disability.

Nothing in this article shall be construed to prohibit a parading carnival krewe or other parading organization from excluding a person with a disability from riding on a float in a parade; provided, that an organization not exempt under the provisions of Section 40C-101(b) may exclude such a person only if the Director certifies in writing, after consultation with the officers of the organization,

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[2] Section 1(1) of M.C.S., Ord. No. 15,058, adopted Feb. 6, 1992, repealed § 40C-104 in its entirety. Formerly, § 40C-104 pertained to registry of nondiscriminatory entities and derived from § 1, of M.C.S., Ord. No. 14,984, adopted Dec. 19, 1991.

with the excluded person, and with the Director of Health, that permitting the person with a disability so to ride would create a public safety or health hazard or would cause an unreasonable burden of expense to the parading krewe or other organization. Any legitimate increase in the cost of procuring insurance may be considered when determining the reasonableness of proposed discrimination. This section shall not authorize the exclusion of any person from the other benefits of membership or participation in such a krewe or organization not exempt under the provision of Section 40C-101(b), on the basis of disability. (M.C.S., Ord. No. 14,984, § 1, 12-19-91; M.C.S., Ord. No. 15,197, § 4, 5-7-92.)

Section 40C-106. Operation of Article III with respect to other laws.

(a) The provisions of this article, for so long as the same remain in effect, shall supersede with respect to discrimination in "public accommodations" as defined in this article, any and all conflicting or incompatible provisions or applications of provisions of Article IV. No respondent or defendant shall be required to defend against or shall be held accountable or guilty of both a charge of discrimination in public accommodations under this article and a charge of discrimination in public accommodations under Article IV if the charge arises out of the same alleged discriminatory practice or acts, if being the intent of this chapter that any discrimination in public accomodation which is unlawful under both Article III and Article IV shall be treated as a violation of this article such time as [a complaint has been filed pursuant to this article.]

(b) The provisions of Subsections (e), (f) and (g) of Section 40(c)-122 of Article IV shall apply to this article.

(c) No complaint shall be filed in Municipal Court regarding discriminatory acts or practices which are prohibited by Article III under [until] such time as a complaint has been filed pursuant to the requirement of Article III and a final disposition of the matter has been made by the Commission. (M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-107. Effective date of enforcement; Blue Ribbon Committee on Carnival.

(a) During the first year following the effective date of [Ordinance Number 14,984,] the ordinance by which this article is adopted, no carnival krewe or parading carnival organization or other organization organized or existing on the effective date of this article for the primary or dominant purpose of observing or participating in the carnival season and no club or institution that falls within the scope of Section 40C-101(b)(2) shall, under this article, be subject to any enforcement action, penalty, prosecution, or liability or denied any permit, right or privilege which it has hitherto enjoyed.

(b) As soon as possible after the adoption of this article, the Mayor shall appoint a citizen's advisory committee, to be known as the Blue Ribbon Committee on Carnival. The Committee shall consist of two (2) members designated by the Mayor, one (1) member designated by each of the seven (7) Councilmembers and nine (9) members designated by the Mayor's Mardi Gras Coordinating Committee.

(c) By the three hundred thirtieth day following the effective date of [Ordinance Number 14,984,] the ordinance by which the article is adopted, the Blue Ribbon Committee on Carnival shall recommend in writing to the Mayor and the Council any amendments to this chapter which they believe appropriate to promote the interests of the city in preserving the benefits of its traditional carnival and promoting equal rights and opportunities for all. (M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-108. Reserved.

Section 40C-109. Affidavit required; parades during carnival season.

Each applicant for any permit to parade during the carnival season under Chapter 12A of this Code shall, at the time of applying for the permit, file with the Department of Police an affidavit of its captain or other officer of commensurate rank, attesting that the applicant entity or group has no written or unwritten provision in its charter, by-laws, rules, regulations or policies which calls for the refusal, withholding or denying of membership, or any of the services, accommodations, advantages, facilities or privilege offered by the respondent to members or others, because of race, color, creed, religion, national origin, sexual orientation or ancestry, or which unreasonably calls for such discrimination on the basis of age, sex, physical condition or disability, and that the applicant and its members will, except as otherwise authorized by Section 40C-111, treat all proposals for membership in a nondiscriminatory manner in accordance with the procedures contained in the krewe's by-laws and regulations. The filing of such an af-

fidavit shall be a prerequisite to the granting of the permit. (M.C.S., Ord. No. 15,197, § 5, 5-7-92.)

Section 40C-110. Specific enforcement provisions for Section 40C-101, Institutions.

(a) The violation of this article by carnival krewes, parading carnival organizations, other organizations organized or existing for the primary or dominant purpose of observing or participating in the carnival season and clubs or institutions which fall within the scope of Section 40C-101 and which would not otherwise than under the provisions thereof be considered as a "public accommodation" under this article shall not constitute a misdemeanor and shall not be subject to prosecution or punishment in the Municipal Court, unless the violation arises from the breach of a final, definitive and enforceable order of the Commission or of an order embodying a conciliation agreement or unless the violation is the willful resitance, prevention, impedance, or interference with the Commission or any of its agents or representatives in the perfomance of its duty under this chapter. Notwithstanding any other provisions of this chapter, to the contrary, any violation of this article by carnival krewes, parading carnival organizations, other organizations organized or existing for the primary or dominant purpose of observing or participating in the carnival season and clubs or institutions which fall within the scope of Section 40C-101 and which would not otherwise than under the provisions thereof be considered as "public accommodation" under this article, or by the officers or agents of any body in their capacity as such, which does constitute a misdemeanor, shall be punishable only by a mandatory fine of not less than one hundred

dollars ($100.00) and not more than three hundred dollars ($300.00) and shall not be punishable by imprisonment.

(b) Neither the city nor the Commission shall be obligated to initiate or intervene in any proceedings in any Court for the purpose of enforcing this article or a final order of the Commission against any carnival krewes, parading carnival organizations, other organizations organized or existing for the primary or dominant purpose of observing or participating in the carnival season and clubs or institutions which fall within the scope of Section 40C-101 and which would not otherwise than under the provisions thereof be considered as a "public accommodation" under this article, unless the violation arises from the breach of an order embodying a conciliation agreement or unless the violation is the willful resistance, prevention, impedance or interference with the Commission or any of its agents or representatives in the performance of its duty under this chapter. Nothing in this section shall preclude any nonmunicipal party in interest from initiating such proceedings.

(c) Whenever a Court of competent jurisdiction issues an order of the Court for the enforcement of this article or of an order of the Commission directed to a carnival krewe, parading carnival organization, other organizations organized or existing for the primary or dominant purpose of observing or participating in the carnival season, or clubs or institutions which fall within the scope of Section 40C-101, then during any period when said order is effective, said organization shall not be granted a permit for a carnival parade during the carnival season, as required by Section 12A-20 of this Code, unless a sworn affidavit is

submitted with the permit application by the captain, president or officer of commensurate rank within the organization stating that the court order has been complied with and will continue to be complied with.

(d) Whenever a Court of competent jurisdiction issues an order of court for the enforcement of this article or of an order of the Commission directed to a carnival krewe, parading carnival organization, other organizations organized or existing for the primary or dominant purpose of observing or participating in the carnival season, or clubs or institutions which fall within the scope of Section 40C-101, said organization shall not be granted an alcoholic beverage permit unless a sworn affidavit is submitted with the permit application by the captain, president or officer of commensurate rank within the organization stating that the court order has been complied with and will continue to be complied with. Subsection (d) shall not apply to an alcoholic beverage permit for a business which either holds or is applying for an occupational license issued by the Department of Finance, nor to temporary alcoholic beverage permits.

(e) The submission of a sworn affidavit pursuant to subsections (c) or (d) which contains false statements, in addition to being subject to any other penalty provisions for the making of false affidavits, shall be considered a misdemeanor punishable by a mandatory fine of not less than one hundred dollars ($100.00) and not more than three hundred dollars ($300.00). (M.C.S., Ord. No. 15,058, § 1(2), 2-6-92.)

Section 40C-111. Preservation of traditional roles in carnival parading organization.

(a) The Council finds that:

(1) Carnival organizations have traditionally engaged in parades, procession, tableaux, and other activities that have, in large part, a dramatic theatrical character, involving elaborate costumed role-playing by participants who frequently imitate or portray the behavior of ancient or medieval court life;

(2) Although such traditional carnival activities most often involve participation by both women and men, the participants traditionally engage in courtly roles defined and differentiated according to the sex of the participants, as was the case in ancient and medieval court life;

(3) The preservation of the traditional mimicry of court life is worthy of preservation as a significant aspect of the common cultural heritage of all the people of New Orleans;

(4) Most women and men in the city who wish to find ways of participating in carnival organizations can do so, either as members or consorts of members in the traditional krewes that restrict membership to one or the other sex, or in one of the less traditional organizations which admit both sexes to membership; therefore, the Council finds that the traditional organizations by restricting their member-

ship to one sex do not significantly impair the ability of women or men to make business contacts, secure professional advancement, or otherwise participate in trade, commerce, the professions, or public life in general.

(b) Nothing in this chapter shall prohibit any carnival krewe, parading carnival organization, or other organization organized or existing for the primary or dominant purpose of observing or participating in the carnival season from restricting its membership or any class of membership to classes based on sex. (M.C.S., Ord. No. 15,197, § 6, 5-7-92.)

Sections 40C-119. Reserved.

ARTICLE IV. DISCRIMINATION IN PUBLIC ACCOMODATIONS, EMPLOYMENT, AND REAL ESTATE AND HOUSING.

Section 40C-120. Definitions-Discrimination unlawful practices.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

(1) *Commercial housing.* Housing accommodations held or offered for sale or rent by a real estate broker or agent, or by any person pursuant to authorization of the owner, by the owner or by a legal representative of the owner.

(2) *Discrimination.* Any difference in treatment in hiring, referring for hire, promoting, training, in membership in employee or labor organizations, selling, leasing, rental or financing of housing, or in rendering services, accommodations, advantages, facilities, or privileges offered by a public facility or place of public accommodation on the basis of race, color, gender, marital status, age, creed, religion, national origin, ancestry, sexual orientation or handicap.

(3) *Handicap.* An impairment which substantially limits one or more life activities or:

a. a record of such impairment; or

b. a perception of such an impairment.

(4) *Life activities.* Functions such as caring for ones self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(5) *Owner.* Shall include curator, administrator, tutor, executor, lessee, sublessee, signee, manager, agent or any other person having the right or ownership of possession or the authority to sell, rent or lease any commercial housing, including the City of New Orleans.

(6) *Person.* An association, partnership, corporation and governmental entity, as well as a natural person. As applied to partnerships or other associations, "person" includes their members and as ap-

plied to corporations, "person" includes their officers.

(7) *Public accommodation.* Any place or means of transportation which is open to, accepts or solicits the patronage of members of the general public, but does not include any place which is a bona fide private club where the accommodations, facilities and services are restricted to the members of such club and their guest.

(8) *Public facility.* Any facility owned, operated, or managed by any governmental entity.

(9) *Sexual Orientation.* Homosexuality, heterosexuality or bisexuality. (M.C.S., Ord. No. 14,976, § 1, 12-12-91.)

Section 40C-121. Same—Unlawful practices.

It is unlawful for any person:

(1) To discriminate against any person, either directly or indirectly, by refusing, withholding or denying to such person any of the services, accommodations, advantages, facilities or privileges offered by a public facility or place of public accommodation, by setting different rates, charges, identification procedures or requirements therefor, or by placing or attempting to place any person in a separate section or area of the premises or facilities of the public accommodation, resort or amusement on the basis of race, color, gender, marital status, age, creed,

religion, national origin, ancestry, sexual orientation, or handicap; provided that nothing contained in this section shall prohibit the provision of separate bathroom, restroom shower or similar facilities for males and females.

(2) To discriminate by failing or refusing to hire or by discharging an individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect an individual status as an employee on the basis of that individual's race, color, gender, marital status, age, creed, religion, national origin, ancestry, sexual orientation, or handicap.

(3) To discriminate in the selling, renting or leasing of commercial housing or real estate on the basis of race, color, gender, marital status, age, creed, religion, national origin, ancestry, sexual orientation or handicap.

(4) to publish, circulate, display, post or mail either directly or indirectly, any written or printed communication, notice or advertisement which evidences an intent to violate directly or indirectly any of the provisions of this section.

(5) To aid, abet, incite, counsel or coerce the doing of any act therein declared to be unlawful or to prevent

any person from complying with this section or any rule, regulation or order issued pursuant to this section. (M.C.S. Ord. No. 14,976, § 1, 12-12-91.)

Section 40C-122. Exclusions from Sections 40C-120 and 40C-121.

Nothing in Sections 40C-120 and 40C-121 of this article shall be construed to:

(1) Restrict an employer's right to require that an employee meet bona fide job-related qualifications of employment.

(2) Authorize or require employers to establish affirmative action quotas based on sexual orientation.

(3) To apply to any business, trade or occupation employing fewer than eight (8) employees, or to any unit in a residential structure containing not more than four (4) units, if the owner maintains and occupies one of such units as his residence.

(4) To apply to any religious corporation, religious entity, religious association, or religious organization, or any non-profit corporation, or organization or group, including charitable organizations, with respect to the employment of individuals, or with respect to the employment policies, practices and procedures established by any such corporation, entity, association, or society.

(5) Make lawful any act that violates the Louisiana Criminal Code.

(6) The provisions of this article shall not be read to limit or affect in any way rights and privileges existing under state or federal law and the City of New Orleans explicitly disavows its rights to any period of exclusive jurisdiction over filed charges which may exist under state or federal law, including but not limited to U.S.C., Section 2000(e), et seq.

(7) Notwithstanding anything herein expressed to the contrary, nothing in this article shall be deemed or construed to authorize or encourage the promotion of sexual orientation in any public or private educational institution or school, or to require the teaching in any public or private educational institutional of sexual orientation. It is the intent of this article to assure the rights of the citizens of this city and all persons, particularly with respect to the securing of housing and employment; this article does not have for its purpose the establishment of any public policy regarding the acceptability or nonacceptability of sexual practice. (M.C.S., Ord. No. 14,976, § 1,-12-12-91.)

Section 40C-123. Enforcement and penalties.

Any violations of Sections 40C-120 and 40C-121, shall prior to the initiation of a prosecution in Municipal Court, be reported and processed in the manner specified within Chapter 40C. In the event that Chapter 40C has no enforcement provisions, or they are ruled unconstitutional, then any violators of Sections 40C-120 and 40C-121 shall be punishable in the same manner as specified in the

Municipal Criminal Code, and more particularly by Section 42-1 through 42-25, inclusive, but in no event shall the minimum penalty for any violation of Sections 40C-120 and 40C-121 be less than that specified in Section 42-5.1 of the Municipal Criminal Code. (M.C.S., Ord. No. 14, 976, § 1, 12-12-91.)

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No. 94-1805

In the
Supreme Court of the United States
OCTOBER TERM, 1994

THE CITY OF NEW ORLEANS, THE HUMAN RELATIONS COMMISSION AND EARL D. JACKSON, SR., IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE HUMAN RELATIONS COMMISSION,
Petitioners,

vs.

LOUISIANA DEBATING AND LITERARY ASSOCIATION, THE STRATFORD CLUB, THE BOSTON CLUB OF NEW ORLEANS AND THE PICKWICK CLUB,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Considering the Court of Appeals' affirmance of the District Court's holding that four local social clubs (the "Clubs") were entitled, on an as-applied basis, to the First Amendment's "fullest protection" as private, intimate associations, a holding the Petitioners do not challenge, should the Court issue an advisory opinion delineating the extent to which the City of New Orleans (the "City") could have investigated the Clubs under its public accommodations ordinance had they not first obtained an adjudication of their rights in federal court?

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Note, *State Power and Discrimination by Private Clubs: First Amendment Protection of Non-expressive Associations,* 104 Harv. L. Rev. 1835 (1991) 9

CITATIONS TO OPINIONS BELOW

Respondents adopt the citations to opinions set forth in the Petition for Writ of Certiorari. In addition, Respondents refer to the March 5, 1993 Minute Entry and May 5, 1993 Order on Status Conference, set forth in their Appendix as Items 1 and 2.

STATEMENT REGARDING JURISDICTION

Petitioners seek an advisory opinion. Under Article III of the Constitution, this Court has jurisdiction to adjudicate only "cases" and "controversies" and may not issue advisory opinions.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article III, § 2, of the Constitution provides:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution . . . . . .

2. The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of

> religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of their grievances.

3. The Fourteenth Amendment, § 1, to the Constitution provides:

> ...[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

On page 2 of their petition, Petitioners state that the Ordinance in question "was modeled on a similar New York City ordinance upheld against a facial attack by this Court... ." Actually, as explained in the Court of Appeals' opinion (note 29 at A-34), the New Orleans ordinance is broader than the New York City ordinance in the critical definition of a public accommodation.

On page 5 of their petition, Petitioners incorrectly state the following: "Shortly after the actions were filed, the City advised the district court that it would not refrain from proceeding with any investigation of the Clubs during the pendency of the litigation, without the need for a restraining order." Inasmuch as the City actually advised the District Court of just the opposite, the inclusion of the word "not" in that statement is probably an inadvertent typographical error. Indeed, on March 5, 1993, the District Court issued a minute entry confirming the City's position

that it would not proceed with an investigation of the Clubs before the conclusion of the case. (B-1.) On May 5, 1993, the District Court entered an order providing that the "defendants [Petitioners] agree not to conduct any administrative investigation and agree not to take any adverse action against the plaintiffs [Respondents] pending the outcome of this case." (B-2-3.)

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari should be denied. There are no "special and important reasons" to grant it, as required by Rule 10. Moreover, because Petitioners essentially seek an advisory opinion, there is no "case" or "controversy" presented for review as jurisdictionally required under Article III of the Constitution.

The issue raised by petitioners — *i.e.*, the extent of the City's right to investigate the Clubs under the Ordinance — is academic. The Court of Appeals found that the Clubs are located at the "most intimate" end of the spectrum of personal attachments and that "they enjoy the fullest protection of their right of private association." (A-33-34.) The Court of Appeals held that the Ordinance, as applied to the Clubs, violates the First Amendment because of the Clubs' protected private nature. Petitioners do not contest the judgment of the Court of Appeals. Indeed, Petitioners seek only a "clarification" of the decision below; reversal of the judgment is not even suggested.

Consequently, no administrative investigation of the Clubs under the Ordinance is necessary or appropriate. The only reason to conduct such an investigation would be to

gather facts necessary to determine whether the Clubs are sufficiently private to invoke First Amendment protection. Since the private nature of the Clubs has been judicially established, and their right to First Amendment protection is not now contested, an investigation would serve no purpose.

Second, the decision of the Court of Appeals is not in conflict with any decision of any other Court of Appeals or of this Court. To the contrary, the Court of Appeals followed the analysis set forth in *New York State Club Ass'n v. City of New York, Board of Directors of Rotary Int'l v. Rotary Club* and *Roberts v. United States Jaycees.* The Court of Appeals then applied the customary strict scrutiny test and correctly concluded that the City had not sustained its burden of establishing that it could not achieve its objective of eradicating discrimination by any less intrusive means of investigation than those authorized under the Ordinance.

Third, contrary to the contention made on page seven of the City's petition, the Court of Appeals' opinion presents no legal conundrum. The courts below held the Ordinance unconstitutional only as applied to the Clubs. The holdings of the courts below turned on the specific facts of this case, and the City does not contest the judgment. This Court has previously articulated the elements of private club status for First Amendment purposes, which the courts below followed in this case. If an organization other than the Clubs is threatened with an investigation under the Ordinance, and that organization does not successfully obtain federal court protection, then there is no obstacle

to the City's conducting an investigation and enforcing the Ordinance against it.

REASONS FOR DENYING THE WRIT

I.

Petitioners Seek An Advisory Opinion That Will Have No Effect On The Case Before The Court.

The question presented for review raises no justiciable controversy. After a detailed examination of the evidence establishing the Clubs' private nature, the Court of Appeals determined on the merits that the Clubs were private social organizations entitled to First Amendment protection. The Court of Appeals also found that the threatened administrative investigation under the Ordinance would impermissibly burden the Clubs' First Amendment rights.

The City does not now contest the private status of the Clubs; thus, the City need not investigate the Clubs to determine whether they are private. Because the City has accepted the judicial determination of the Clubs' private nature and therefore cannot apply the Ordinance to the Clubs, a decision by this Court with respect to the question presented by Petitioners will not decide any actual case or controversy between the parties. The Constitution does not authorize this Court to act absent a justiciable controversy:

> "[A]t an irreducible minimum, Art III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' and that the injury 'fairly can be traced to the challenged action' and *'is likely to be redressed by a favorable decision'*...
>
> "The requirement of 'actual injury redressable by the court,' serves several of the 'implicit policies embodied in Article III.' *It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.* The 'standing' requirement serves other purposes. Because it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case with some confidence that *its decision will not pave the way for lawsuits which have some, but not all of the facts of the case actually decided by the court.*"

Bender v. Williamsport Area School Dist., 475 U.S. 534, 542-43 (1986) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (citations omitted)(emphasis added)).

A decision on the question presented by Petitioners would not redress any grievance they have against the Clubs. Instead, the City requests an advisory opinion as to how and what investigations may be conducted by it in the

future with respect to other organizations that may or may not claim to be private clubs and may or may not fall within the holding of this case. Such advisory opinions are not granted by this Court. *Mistretta v. United States,* 488 U.S. 361, 385 (1989) ("In implementing this limited grant of power [under Article III], we have refused to issue advisory opinions or to resolve disputes that are not justiciable.") Further, the City's petition does not seek review of the *judgment* of the Court of Appeals, but instead seeks an opinion from this Court that will "clarify" the theory and principles underlying the Court of Appeals' ruling. ***The City does not even suggest that this Court reverse the judgment of the Court of Appeals.*** Therefore, Petitioners seek no relief that would have any effect on the dispute between the parties before the Court.

Finally, because the Court of Appeals held that the substantive provisions of the Ordinance could not be applied to the Clubs, the portion of its opinion evaluating the degree of intrusiveness of a City investigation under the Ordinance was not strictly necessary to its decision. The only purpose of such an investigation would be to determine if the Clubs had violated the Ordinance. For this reason, even if the opinion of the Court of Appeals erred with regard to the question presented, which the Clubs deny, the error would be harmless and would not subject the judgment of the Court of Appeals to reversal by this Court on review. *See*, 28 U.S.C. § 2111 (providing that the Court shall give judgment"...without regard to errors or defects which do not affect the substantial rights of the parties."); *United States v. Lane,* 474 U.S. 438, 445 (1986).

II.

The Decision Of The Court Of Appeals Is In Accord With Previous Decisions Of This Court And Further Review Is Not Merited.

Contrary to the City's assertion, not only does the decision of the Court of Appeals not conflict with this Court's decision in *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988), but it follows a number of this Court's pronouncements in that case. The facial challenge in the New York case did not concern, and the decision did not address, the permissible scope of inquiry and level of scrutiny constitutionally permissible in applying the municipal public accommodations ordinance there before the Court. On the other hand, the Court did find that the mere existence of the New York City ordinance threatened injury, and it expressly confirmed the right of individual private clubs to assert their First Amendment rights of privacy and association on a case-by-case basis when threatened with enforcement of the ordinance. *New York State Club Ass'n*, 487 U.S. at 9-10, 13-14. In the instant case, the Court of Appeals adjudicated just such an as-applied challenge, applying the strict scrutiny analysis in a manner well recognized by the decisions of this Court and the lower federal courts. *See Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Clark v. Library of Congress*, 750 F.2d 89, 94 (D.C. Cir. 1984).

Despite the contention in the City's petition, the issue adjudicated in this case does not involve a novel and

significant constitutional question. As indicated below, this Court has previously recognized the privacy interests implicated in this case and the unconstitutionality of governmental regulation of such private relationships. The Harvard Law Review note, quoted out of context by the City in its petition, likewise concludes that the First Amendment protects private social clubs from governmental regulation of their membership. Note, *State Power and Discrimination by Private Clubs: First Amendment Protection of Nonexpressive Associations,* 104 Harv. L. Rev. 1835, 1837 (1991). The Court of Appeals' decision was thus grounded in standards that have been articulated by this Court on a number of occasions in the past.

This Court has held "that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships." *Board of Directors of Rotary Int'l v. Rotary Club,* 481 U.S. 537-544 (1987). During the last decade, this Court has explained in detail the constitutional analysis appropriate to evaluate attempts under state and local public accommodations legislation to eliminate discrimination in organizations claiming to be private. *See New York State Club Ass'n v. City of New York; Board of Directors of Rotary Int'l v. Rotary Club; Roberts v. United States Jaycees,* 468 U.S. 609 (1984). The Court of Appeals relied closely on that analysis in the instant case and held that the Respondents are private clubs entitled to constitutional protection from unwarranted state intrusion. The City did not seriously contest on appeal the private status of the Clubs, and it does not contest that status in its petition.

The decisions of this Court cited above also establish that the extent of protection from governmental interference accorded personal relationships depends upon the degree of intimacy of the private association at issue:

> [T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.
>
> Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursion by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.

Roberts, 468 U.S. at 620 (citations omitted). The Court of Appeals expressly followed *Roberts* and relied on the standards enunciated in that case by making a factual analysis of where the Clubs fell on the spectrum of constitutionally protected relationships. The Court of Appeals held that the Clubs were located at the most intimate end of the spectrum and, therefore, were entitled to a high degree of protection. Accordingly, the Court of Appeals held that the public investigation envisioned in the Ordinance could not constitutionally be applied to the Clubs.

After affirming the District Court's holding that the Clubs were private and entitled to protection under the First Amendment, the Court of Appeals then applied the customary strict scrutiny analysis to assess the degree of interference with the Clubs' associational rights that was likely to result from the threatened City investigation. As the Court of Appeals explained, the City had the burden of demonstrating that the purpose of the Ordinance — to eradicate discrimination in public accommodations — could not be achieved through means "significantly less restrictive" of the Clubs' associational freedom than the means provided for in the Ordinance. (A-35.)

As it did in the proceedings below, the City now ignores the requirements of the strict scrutiny analysis applied by this Court to governmental interference with First Amendment rights of citizens. *See Elrod v. Burns; Clark v. Library of Congress.* The City made no attempt on appeal or in the District Court to show that the methods of investigation authorized by the Ordinance were, with respect to the Clubs' First Amendment rights, the least intrusive methods to effectuate the purpose of the Ordinance. The Court of Appeals therefore held that the City had not satisfied the burden imposed on it by the strict scrutiny test:

> The City failed to address directly how its investigative methods and other procedures are the least intrusive interference with that right.

***

> In sum, the city has failed to meet its burden of demonstrating how the means it has selected to enforce the Chapter are the least intrusive of the Clubs' and their members' right of private association.

(A-35,40.)

No significant constitutional question is presented by the decision of the Court of Appeals on this issue, because the City made no meaningful attempt in either court below to demonstrate that the purpose of the Ordinance could not be achieved through procedures significantly less restrictive of the Clubs' First Amendment rights than those authorized by the ordinance.

For the reasons indicated above, this is a routine case involving the application of strict scrutiny analysis to governmental investigative procedures that implicate First Amendment rights. After determining that the Clubs were entitled to constitutional protection from unwarranted intrusion, and then finding that a threatened investigation under the Ordinance was so intrusive as to violate the privacy of the Clubs, the Court of Appeals applied the correct standard under strict scrutiny analysis and concluded that the Ordinance violated the Clubs' First Amendment rights inasmuch as the City had not satisfied its burden of establishing that the threatened investigation was not the least intrusive method of achieving the stated governmental purposes.

III.

The Decision Below Does Not Present A Legal Conundrum Concerning The Future Enforcement Of The Ordinance.

The City's argument that the Court of Appeals' decision presents a "legal conundrum" regarding the City's investigative powers under the Ordinance is unfounded. The judgments of the courts below apply only to the four Respondents who elected to prove their entitlement to First Amendment protection in federal court proceedings. The City's investigative powers under the Ordinance with respect to other organizations is not affected by the decision below.

The judgment below does not invalidate the Ordinance but holds only that it cannot constitutionally be applied to the Respondents. The judgment did not enjoin the City from investigating other organizations that claim to be private.

The stated purpose of the Ordinance is to eliminate discrimination in public accommodations. Once the Clubs established in federal court that they were not public accommodations subject to regulation under the Ordinance, then no legitimate governmental purpose could be served by investigating their affairs.

The fact-specific nature of the ruling below renders the question presented unsuitable for certiorari. The Court of Appeals' decision according constitutional protection to the Clubs is peculiar to the circumstances of this case and is not necessarily applicable to the Ordinance in other

circumstances. The permitted level of state regulation, whether substantive or investigatory, of any specific organization falling within the spectrum of constitutionally protected associations involves a detailed factual inquiry on a case-by-case basis. This Court has previously recognized this principle:

> [T]he nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case.
>
> ***
>
> Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. *We need not mark the potentially significant points on this terrain with any precision.*

Roberts, 468 U.S. at 618, 618-20 (emphasis added) (citation omitted); *see also New York State Club Ass'n. v. City of New York*, 487 U.S. 1, 15 (1988). Because of the fact-specific holding in this case, the City's concession that these Clubs are private, and the overwhelming evidence in the lower courts supporting the decision below, this is not an appropriate case for review by this Court.

For the reasons stated above, the City's legitimate interest in suppressing discrimination in public accom-

modations is not adversely affected by the Court of Appeals' decision in this case. That decision bars the enforcement of the Ordinance only against four genuinely private social clubs that elected to establish their status as constitutionally protected organizations in federal court before being granted injunctive relief against governmental investigations of their private affairs.

CONCLUSION

For the reasons indicated above, the Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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APPENDIX ITEM 1

FILED
MAR 5 '93

MINUTE ENTRY
McNAMARA, J.
MARCH 5, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUISIANA DEBATING and LITERARY ASSOCIATION, for itself and on behalf of its members	*	CIVIL ACTION
	*	NO. 93-658
VERSUS	*	SECTION "D" (4)
THE CITY OF NEW ORLEANS, ET AL.	*	

On this date, Bruce Naccari of the City Attorney's office confirmed that, without the necessity of a Restraining Order, no Defendant, including the Human Relations Commission, would proceed with an investigation of Plaintiff herein until the issues before this court are resolved.

* * * * * *

DATE OF ENTRY MAR 5 1993

APPENDIX ITEM 2

FILED
MAY 5 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUISIANA DEBATING AND LITERARY ASSOCIATAION, ET AL.	CIVIL ACTION
versus	NO. 93-658 C/W 93-660, 93-661, and 93-685
THE CITY OF NEW ORLEANS, ET AL.	SECTION "D" (5)

ORDER ON STATUS CONFERENCE

The parties and the Intervenors have agreed upon this order and have presented it at a status conference held on May 5, 1993.

Concerning Scheduling

The plaintiffs and the defendants have agreed upon the scheduling matters herein stated, which are hereby ordered.

The defendants agree not to conduct any administrative investigation and agree not to take any

adverse action against the plaintiffs pending the outcome of this case. In light of this, no preliminary injunction hearing is necessary and the plaintiffs' motions for preliminary injunction and for in camera preliminary injunction hearings are withdrawn. Therefore, the Intervenors' opposition to the motion for in camera preliminary injunction hearings need not be addressed.

(4)

Supreme Court, U.S.
FILED
MAY 25 1995
CLERK

NO. 94-1805

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE CITY OF NEW ORLEANS,
THE HUMAN RELATIONS COMMISSION,
and EARL D. JACKSON, SR., in his Official Capacity
as Executive Director of the Human Relations Commission,
Petitioners

v.

LOUISIANA DEBATING AND LITERARY
ASSOCIATION, THE STRATFORD CLUB,
THE BOSTON CLUB OF NEW ORLEANS
and THE PICKWICK CLUB
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Does the ordinance enacted by the City of New Orleans prohibiting discrimination in places of public accommodation establish unduly intrusive procedures governing (1) the City's investigation of complaints of discrimination lodged against a private social club, and (2) the City's determination of the validity of a social club's claim that it is private and thus exempt from application of the ordinance?

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NO. 94-1805
In the
Supreme Court of the United States
OCTOBER TERM, 1994

THE CITY OF NEW ORLEANS,
THE HUMAN RELATIONS COMMISSION,
and EARL D. JACKSON, SR., in his
Official Capacity as Executive Director
of the Human Relations Commission,
Petitioners

v.

LOUISIANA DEBATING AND LITERARY ASSOCIATION,
THE STRATFORD CLUB, THE BOSTON CLUB
OF NEW ORLEANS
and THE PICKWICK CLUB
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JURISDICTION

This Court lacks jurisdiction as provided in Article III, Section 2, clause 1 of the United States Constitution because the Petition for Writ of Certiorari seeks an advisory opinion that can have no effect on the Pickwick Club. The United States Court of Appeals for the Fifth Circuit, affirming the judgment of the District Court for the Eastern District of Louisiana, held that the Pickwick Club is a private club under the First Amendment

to the United States Constitution. The Petition for Writ of Certiorari does not challenge this holding. As a private club, the Pickwick Club is beyond the reach and scope of Chapter 40C of the Code of the City of New Orleans, which by its own terms applies only to places of public accommodation. Because the Pickwick Club is private, Chapter 40C of the Code of the City of New Orleans provides no jurisdiction or authority to the City of New Orleans to investigate complaints of discrimination lodged against the Pickwick Club. Hence any opinion this Court might render on the validity of the investigatory procedures established by Chapter 40C would serve merely to advise the City of New Orleans about future investigations of organizations other than the Pickwick Club.

CONSTITUTIONAL PROVISIONS, CONSTITUTIONAL AMENDMENTS, AND LOCAL ORDINANCES INVOLVED

United States Constitution, Article III, Section 2, clause 1

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; --to all Cases affecting Ambassadors, other public Ministers and Consuls; --to all Cases of admiralty and maritime Jurisdiction; --to Controversies to which the United States shall be a Party; --to Controversies between two or more States; --between a State and Citizens of another State; --between Citizens of different States; and Citizens of another State; --between Citizens of different States; --between Citizens of the same State claiming Lands under

> Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Chapter 40(C) of the Code of the City of New Orleans (Petitioners' Appendix, item 3)

STATEMENT OF THE CASE

Except as herein noted, the Pickwick Club adopts as accurate the Statement of the Case presented in the Petition for Writ of Certiorari.

Petitioners' statement that Chapter 40C of the Code of the City of New Orleans "was modeled on a similar New York City ordinance", Petition, p. 2, is accurate as far as it goes. The two ordinances, however, differ significantly in certain aspects, as noted in the opinion of the Fifth Circuit. Petitioners' Appendix, pp. 33-34, n.29. Consequently, should this Court accept the instant Writ, the Pickwick Club reserves the right to delineate the distinctions between the two ordinances.

Further, Petitioners inaccurately state that "[s]hortly after the actions were filed, the City advised the district court that it would not refrain from proceeding with any investigation of the

Clubs during the pendency of the litigation, without the need for a restraining order." Petition, p. 5. In point of fact, the City advised the district court that it *would* refrain from proceeding with any investigation of the Clubs during the pendency of the litigation. Petitioners' Appendix, p. 9.

REASONS FOR DENYING THE WRIT

I. There Exists No Case or Controversy

The Petition for Writ of Certiorari filed by The City of New Orleans, The New Orleans Human Relations Commission, and Earl D. Jackson, Sr. in his Official Capacity as Executive Director of the New Orleans Human Relations Commission (hereinafter, collectively, "the City") does not request that this Court reverse and remand the judgment of the United States Fifth Circuit Court of Appeals in favor of the Pickwick Club. Rather, the City invites the Court to "review" the "result" of that judgment for the purpose of "clarifying" certain principles, arguing

> If this decision is allowed to stand without review, its effect will be to cripple the ability of municipal government to act on behalf of its citizens to investigate charges of discrimination by a private associations [sic], by cutting off its right to obtain information from such associations, and to permit public inquiry in order to determine its private status and the applicability of anti-discrimination laws. This decision leaves the City with no adequate means of assessing whether its ordinance is validly applicable to a particular entity.

Petition, p. 15. Despite the parade of horribles conjured up by the City, those horribles alone do not provide this Court with

jurisdiction. Because the City has not challenged holdings of the courts below that the Pickwick Club is a private club under the First Amendment to the United States Constitution, the City here seeks a mere advisory opinion that would address its future investigations of organizations other than the Pickwick Club.

The City's Petition for Writ of Certiorari, limited to the issue of the validity of the investigatory procedures established in Chapter 40C of the Code of the City of New Orleans (hereinafter "Chapter 40C"), does not present a case or controversy under Article III, Section 2, clause 1 of the United States Constitution because (1) both lower courts held that Chapter 40C's substantive provisions violate the Club's constitutional right of association and have barred, under permanent injunction, the application of the entirety of 40C to the Pickwick Club; (2) Chapter 40C, by its own terms, is not applicable to a constitutionally protected private association; and (3) the City does not possess a compelling governmental interest in the regulation of membership practices of a constitutionally protected private association. Because the City has failed to contest the primary holdings of the lower courts, this proceeding no longer constitutes a case or controversy under Article III of the United States Constitution; therefore, this Court should deny the City's Petition on the issue of the validity of the investigatory procedures set forth in Chapter 40C.

A. The City Has Not Contested the Holding of the Courts Below that the Substantive Provisions of Chapter 40C May Not Be Applied to the Pickwick Club

Each court below held that the Pickwick Club is a "private club" entitled to the fullest protection afforded by the First Amendment to the United States Constitution, relying on the precedents established by this Court in *New York State Club Association v. City of New York*, 487 U.S. 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481

U.S. 537 (1987); and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Petitioners' Appendix, pp. 24-34, 48-59. The Fifth Circuit held: "In light of the undisputed facts . . . we conclude, as did the district court, that the Clubs constitute organizations whose location on the spectrum of personal attachments places them near those that are 'most intimate'. Accordingly, they enjoy the fullest protection of their right of private association." [1] Petitioners' Appendix, pp. 33-34 (footnote omitted).

Further, a permanent injunction is still in force against the City barring the City from applying the substantive provisions of Chapter 40C to the Pickwick Club. In framing the issue before it, the district court wrote:

> [T]he court must make two separate inquiries. First, whether Plaintiffs are in fact private clubs under the Supreme Court jurisprudence - if not, the court need go no further. Second, whether the

---

[1]The Fifth Circuit stated further:

> Discrimination can find no rest in a place of public accommodation. Whether it should be suffered to abide in private clubs is debatable among persons of good will. But, the Constitution trumps; those clubs have a right of private association under the First Amendment with which the government may not interfere impermissibly. Concomitantly, if those clubs must go public, in order to remain private, then their privacy rights ring hollow indeed; "the flame is not worth the candle".

Petitioners' Appendix, p. 40. This quotation makes it clear that the Fifth Circuit acknowledges that the First Amendment protects a private club, such as the Pickwick Club, from regulation of its membership practices.

> HRC's investigation into the complaint of discrimination against Plaintiffs constitutes unwarranted intrusion into (1) an individual's choice to enter into and maintain certain intimate or private relationships, or (2) the right of an individual not to have his private affairs made public by the government.

Petitioners' Appendix, pp. 47-48. Answering each of the above questions in the affirmative, the court held:

> Each Plaintiff Club has clearly demonstrated that it is a private club located at the most intimate end of the qualitative continuum of personal relationships. As such, *Plaintiffs have a First Amendment right to enter into and maintain certain intimate human relationships without undue state intrusion and a right not to have their private affairs made public by the government.*
> * * *
> After reviewing the entire record, including arguments of counsel, the court finds that Defendant should be permanently enjoined from investigating any complaints of discrimination against Plaintiffs pursuant to Chapter 40C and from applying or attempting to apply Chapter 40C to plaintiffs in any way....

Petitioners' Appendix, pp. 70-71 (emphasis supplied). Thus, the district court understood that Chapter 40C was unconstitutional as to the Pickwick Club in at least two respects. First, Chapter 40C interferes impermissibly with the Club's right to maintain

intimate relationships because the statute's substantive provisions[2] attempt to regulate alleged discrimination by the Club in its membership practices. Second, the procedures employed by Chapter 40C to investigate allegations of discrimination interfere with the Club's associated right not to have its private affairs made public by the government.

The district court further issued a permanent injunction barring the City from applying Chapter 40C's substantive provisions and investigation provisions to the Pickwick Club:

> IT IS FURTHER ORDERED that Defendants, their officers, officials, agents, employees, and successors be and are hereby

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[2] Section 40C-102 of Chapter 40C contains the substantive provisions that make discriminatory practices unlawful in public accommodations, resorts, or amusements. It reads in part:

> (a) it shall be unlawful discriminatory practice and a misdemeanor for any public accommodation, resort, or amusement, as defined in Section 40C- 101 or for any person who is the owner, lessee, proprietor, manager, superintendent, employee, officer or agent thereof:
>
> (1) To discriminate against any person, either directly or indirectly, by refusing, withholding, or denying to such person any of the services, accommodations, advantages, facilities or privileges offered by the public accommodation, resort or amusement, by placing or attempting to place any person in a separate class of customers, patrons, members, guests or users or in a separate section or area of the premises or facilities of the public accommodation, resort or amusement because of race, color, creed, religion, national origin, ancestry, or unreasonably because of age, sex, sexual orientation, physical condition or disability.

> PERMANENTLY ENJOINED from *investigating any complaint of discrimination* against the Louisiana Debating and Literary Association, the Stratford Club, the Boston Club of New Orleans, and the Pickwick Club pursuant to Chapter 40C of the Code of the City of New Orleans, *and from applying or attempting to apply Chapter 40C of the Code of the City of New Orleans in any way to the Louisiana Debating and Literary Association, the Stratford Club, the Boston Club of New Orleans, and the Pickwick Club.*

Petitioners' Appendix, pp. 70-71 (emphasis supplied). The district court understood that substantive provisions of Chapter 40C invade the Pickwick Club's right to maintain "intimate associations." It further understood that Chapter 40C's investigation procedures invade the Pickwick Club's right to not have its private affairs made public by the government. Consequently, the district court entered a permanent injunction barring the City from applying both the substantive and investigation provisions of Chapter 40C.

In sum, both lower courts held that the City is barred from applying Chapter 40C's substantive provisions to the Pickwick Club, yet the City here contests only that portion of the Fifth Circuit's opinion that addresses Chapter 40C's investigative procedures. The City has framed the issue presented for review by this Court as follows:

> Whether *the procedures* established by the City of New Orleans pursuant to an anti-discrimination ordinance, modeled upon that upheld in a previous decision of this Court, for *investigating complaints*

> *of discrimination and for determining the validity of claims of constitutional private club exemption* from application of the ordinance, are unduly intrusive of a private nonexpressive association.

Petition, p. i (emphasis supplied). The City, then, does not contest that the Pickwick Club is a private club protected by the First Amendment from the substantive application of Chapter 40C, nor does it contest the validity of the permanent injunction still in force that bars the City from applying the substance of Chapter 40C to the Pickwick Club. It is axiomatic that in order for Chapter 40C's investigation procedures to have any purpose at all, the Pickwick Club must be the type of association that is not insulated by the Constitution from the application of Chapter 40C's substantive provisions.[3] Consequently, the failure of the City to contest the holdings of the courts below that the Pickwick Club is a private club deserving of constitutional protection from Chapter 40C destroys the "case or controversy" element of this proceeding.

Supreme Court Rule 14.1(a) limits the scope of review on certiorari to the issues presented by the petitioner: "[o]nly the questions set forth in the petition, or fairly included therein, will

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[3] In effect, the City urges in this Court that it is entitled to investigate the alleged discriminatory practices of an organization under an anti-discrimination statute despite the undisturbed holdings of two lower federal courts that the substance of the anti-discrimination statute cannot be applied against that organization because the substance of the statute would violate that organization's First Amendment right of freedom of association.

be considered by the Court." S.Ct.R. 14.1(a).[4] *See also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S.Ct. 425, 426-27 (1993) (holding that an issue not raised in the "question presented" of the petition for certiorari would not be considered); *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753, 764-65 (1993) (stating that failure to raise an issue within questions on which petitioner sought review is alone enough to exclude the issue from review); *Yee v. City of Escondido*, 112 S.Ct. 1522, 1532-33 (1992) ("[w]hile the statement of any question presented will be deemed to comprise every subsidiary question fairly included therein, we ordinarily do not consider

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[4] "Rule 14.1(a) serves two important and related purposes. First, it provides the respondent with notice of the grounds upon which the petitioner is seeking certiorari, and enables the respondent to sharpen the arguments as to why certiorari should not be granted. Were we routinely to consider questions beyond those raised in the petition, the respondent would lack any opportunity in advance of litigation on the merits to argue that such questions are not worthy of review. Where, as is not unusual, the decision below involves issues on which the petitioner does not seek certiorari, the respondent would face the formidable task of opposing certiorari on every issue the Court might conceivably find present in the case. By forcing the petitioner to choose his questions at the outset, Rule 14.1(a) relieves the respondent of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unpresented questions.

Second, Rule 14.1(a) assists the Court in selecting the cases in which certiorari will be granted. Last term alone we received over 5,000 petitions for certiorari, but we have the capacity to decide only a small fraction of these cases on the merits. To use our resources most efficiently, we must grant certiorari only in those cases that will enable us to resolve particularly important questions. Were we routinely to entertain questions not presented in the petition for certiorari, much of this efficiency would vanish...." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1532-33 (1992).

questions outside those presented in the petition for certiorari").

Petitioners have not contested and are barred now from contesting that the application of the substantive provisions of Chapter 40C to the Pickwick Club is violative of the Club's constitutional rights under the First Amendment. Furthermore, the City is barred from contesting the validity of the permanent injunction issued by the district court prohibiting the City "from applying or attempting to apply Chapter 40C . . . in any way to . . . the Pickwick Club." Petitioners' Appendix, p. 71. Because the only issue presented to this Court is whether the investigative procedures of Chapter 40C are overly intrusive, any issues concerning the application of the substance of Chapter 40C, to-wit the prevention of discrimination, to the Pickwick Club is barred.

The failure of the City to contest the full holdings of the lower courts or the validity of the permanent injunction barring application of the substance of Chapter 40C to the Pickwick Club divests this Court of jurisdiction because the proceeding no longer present a "case or controversy" under Article III of the United States Constitution. *See Burke v. Barnes*, 479 U.S. 361, 363 (1987) (Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case); *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988) (Article III of the Constitution limits federal courts to the adjudication of actual, on-going controversies between litigants). The City is barred by the holdings of the lower courts and by the extant permanent injunction from applying the substantive provisions of Chapter 40C to the Pickwick Club. *See* S.Ct.R. 14.1(a). Any ruling of this Court on the validity of the City's investigatory procedures would be of no efficacy vis-a-vis the Pickwick Club: the City no longer has the right or ability to investigate the Pickwick Club pursuant to Chapter 40C because

the substantive provisions of Chapter 40C may not be applied to the Pickwick Club.

"Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,' . . . and confines them to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Lewis v. Continental Bank Corporation*, 494 U.S. 472, 477 (1990) (citations omitted). It is irrelevant that there may have been a case or controversy in the district court or court of appeal,[5] because a case or controversy must exist at all stages of the proceedings. *Lewis*, 494 U.S. at 477; *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). Ultimately, the City's request for review of Chapter 40C's investigatory procedures is a request for no more than an "advisory opinion" because even if this Court held that the Chapter 40C's procedures for investigating complaints or for investigating the private club status of the Pickwick Club were not overly intrusive and did not violate the First Amendment right of association of the Club, the City is yet barred from applying the substantive provisions of Chapter 40C to the Pickwick Club.

B. Chapter 40C Itself Bars Future Investigation of the Pickwick Club

Under its own terms, Chapter 40C is not applicable to

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[5] The Pickwick Club does not argue that a case or controversy never existed in this action, but, rather, the Club maintains that the failure of the City to contest dispositive holdings and orders of the trial and appellate courts destroys the case or controversy elements of this litigation.

constitutionally protected private associations. Section 40C-103(b)(2), Petitioners' Appendix, p. 102. Consequently, the failure of the City to contest the holdings of the lower courts that the Pickwick Club is a constitutionally protected private association renders moot the Petition for a Writ of Certiorari sought by the City on the issue of the intrusiveness of Chapter 40C's investigation procedures. *See Deakins v. Monaghan*, 484 U.S. 193, 199 (1988) (holding that decision by a party to abandon its claim to equitable relief renders the question on which certiorari was requested moot).

Section 40C-103 provides an exception to the application of Chapter 40C for "distinctly private entities," protecting such entities from the application of Section 40C- 102, which contains the substantive provisions of the Chapter. Petitioners' Appendix, p. 102. Section 40C-103 provides in pertinent part:

> A club or institution is distinctly private in character if either:
>
> (2) its character as an institution, club, or association is such that, under the constitutional doctrines of freedom of association (including expressive association) and privacy prevailing in the law at the time of the hearing, the Constitution of this state or of the United States requires that Section 40C-102 not be applied against it.

Section 40C-103(b)(2), Petitioners' Appendix, pp. 102, 104. Hence a club that is protected by the freedom of association established by the First Amendment is beyond the scope of Chapter 40C.

As discussed above, both courts below held that the Pickwick Club is a private association entitled to the fullest

protection afforded by the First Amendment. The district court held that "Plaintiffs have a First Amendment right to enter into and maintain certain intimate human relationships without undue state intrusion...." Petitioners' Appendix, p. 70. The court further found injunctive relief appropriate to protect the Club from application of Chapter 40C: "After reviewing the entire record, including arguments of counsel, the court finds that Defendant should be permanently enjoined from investigating any complaints of discrimination against Plaintiffs pursuant to Chapter 40C and from applying or attempting to apply Chapter 40C to plaintiffs in any way...." Petitioners' Appendix, p. 70. The Fifth Circuit also held that the Pickwick Club is entitled to constitutional protection from the mandates of Chapter 40C. Petitioners' Appendix, pp. 33-34, 40. Furthermore, the Fifth Circuit affirmed the rulings of the district court, including the permanent injunction barring the City from applying Chapter 40C to the Pickwick Club "in any way." Petitioners' Appendix, p. 41.

The City's Petition to this Court has not contested these holdings or orders of the lower courts and, therefore, any issues relating to those holdings and orders are not before this Court. *See* S.Ct.R. 14.1(a). Under the holdings of the lower courts, uncontested here, the Constitution of the United States requires that Section 40C-102 not be applied to the Pickwick Club. Section 40C-103(b)(2), Petitioners' Appendix, pp. 102-104. Whether Chapter 40C's investigative procedures are overly intrusive is now a moot question because Chapter 40C does not apply to the Pickwick Club under the ordinance's own terms. *See Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). "It has long been settled that a federal court has no authority 'to give opinions on moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of California v. United States*,

113 S.Ct. 447, 449 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

"Redressability" is a necessary component of the "case or controversy" requirement and is unsatisfied by the City's Petition. *See Northeastern Florida Contractors v. Jacksonville*, 113 S.Ct. 2297, 2302 (1993); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). "To invoke the constitutional power of the federal courts to adjudicate a case or controversy under Article III, [petitioners] here must allege and prove an injury 'fairly traceable to the to the [respondents'] allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2776 (1992). Here the City has not satisfied the redressability component of Article III jurisdiction because any ruling concerning the intrusiveness of the City's investigative procedures would leave undisturbed the holdings below that the Pickwick Club is constitutionally protected from the application of Chapter 40C and, therefore, that the Club is, by Chapter 40C's own definition, outside its reach.

C. Chapter 40C Does Not Provide to The City Any Legitimate Interest in Regulating Private Social Clubs

Even if the Pickwick Club were covered under the ambit of Chapter 40C, the determination by the Fifth Circuit and the district court, uncontested in this Court, that the Pickwick Club is a "private club" for First Amendment association purposes bars the City from regulating discrimination at the Pickwick Club. Having refused to contest the holding of the Fifth Circuit that the Pickwick Club is a constitutionally protected private association deserving of the fullest protection of its right of private association, the City now asserts only that the procedures established by Chapter 40C for investigating the Pickwick Club are not overly intrusive of the Club's First Amendment rights. The City, however, has no legitimate governmental interest in

regulating discrimination or in investigating allegations of discrimination at a purely private social club. This lack of legitimate interest is particularly striking in terms of the Pickwick Club, whose "personal attachments places [it] near those that are 'most intimate.' " Petitioners' Appendix, pp. 33-34.

The City's interest in eradicating discrimination is limited to places of public accommodation and does not extend to purely private social clubs. Section 40C-50 sets forth the policy underpinning Chapter 40C:

> In the City of New Orleans with its great cosmopolitan population consisting of large numbers of people of every race, color, creed, religion, age, physical condition, national origin and ancestry, many of them with disabilities, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of differences of race, color, sex, creed, religion, age, national origin or ancestry, or physical condition or disability or sexual orientation. The Council hereby finds and declares that prejudice, intolerance, bigotry, and discrimination and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state. The New Orleans Human Relations Commission as created by Article I of this chapter is designated as an instrument of the city's power to eliminate and prevent discrimination in employment, in places of accommodation, resort or amusement, in housing accommodations and

> in commercial space because of race, creed, religion, color, sex, age, sexual orientation, national origin, ancestry, or physical condition or disability whenever such discrimination is prohibited by provisions of this chapter or other city law.

Petitioners' Appendix, pp. 82--83. The policy of Section 40C does not include, nor could it, the prevention of discrimination in places of purely private or intimate association. Indeed, the City itself acknowledges that Chapter 40C was adopted "to eliminate and prevent discrimination in . . . places of public accommodation . . ." Petition, p. 2.

A government's interest in regulating the freedom of persons to enter into intimate associations depends on where that association falls on the spectrum of personal relationships, from the most intimate to the most attenuated. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1986); *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1983). In the case *sub judice*, the district court held:

> Because Plaintiff Clubs easily met every factor in determining private club status and because they have very selective membership policies designed to ensure comradery and close personal acquaintances, this court finds that Plaintiff Clubs are entitled to the fullest protection of the First Amendment's right to privacy an freedom of intimate association.

Petitioners' Appendix, pp. 59-60. The Fifth Circuit also found that the Pickwick Club is among those associations that are most intimate: "we conclude, as did the district court, that the Clubs

constitute organizations whose location on the spectrum of personal attachments places them near those that are "'most intimate'". Petitioners' Appendix, p. 33.

In its Petition, the City acknowledges these findings:

> The analysis undertaken by the Fifth Circuit in this opinion involved extensive assessment of such information, including the Clubs' history, purposes, activities, membership criteria, admission processes, internal rules and by-laws, structural organization and number of members, leading to the conclusion that they were sufficiently "private" in nature to be entitled to "full constitutional protection" of their First Amendment rights of private association.

Petition, p. 8. Yet the City did not seek review of these holdings of the lower courts, to-wit, that the Pickwick Club is a private club of constitutionally protected intimate association. The City only seeks review of the investigation procedures provided by Chapter 40C. *See* "Question Presented," Petition, p. i. The City is now barred from arguing that the Pickwick Club is not an "intimate" association protected by the constitution. S.Ct.R. 14.1(a). Under these circumstances, the City simply has no authority, pursuant to Chapter 40C, to apply the investigatory provisions of Chapter 40C to the Pickwick Club.

II. The Fifth Circuit Opinion Is Correct

The City mistakenly advises this Court that "[T]he courts below struck down the City's anti-discrimination ordinance as unconstitutional . . ." Petition, p. 7. This assertion is inaccurate: Chapter 40C of the Code of the City of New Orleans stands unmolested. At all times during the proceedings below, the

Pickwick Club was careful to underscore that the instant suit was an "as-applied" challenge. Neither the Pickwick Club nor the other plaintiffs below argued that Chapter 40C is inherently unconstitutional or that any conceivable application of Chapter 40C to any conceivable organization would violate the First Amendment. Rather, the clubs merely alleged that Chapter 40C is unconstitutional as applied to them. Both courts below expressly rejected the City's argument that this case presented a facial challenge to Chapter 40C. Petitioners' Appendix, pp. 22 ("[W]e are faced with an as-applied challenge."), 47 ("At the outset, the court finds that Plaintiffs are challenging the Ordinance on constitutional grounds only as the Ordinance applies to them ... Accordingly, this court will analyze Plaintiffs' constitutional claims as an 'as-applied' challenge to the Ordinance.").

Because the suit below involved as-applied challenges to Chapter 40C, the judgments of the lower courts have a narrow application, *i.e.*, they affect only the four plaintiff social clubs. The City's Petition, however, requests that this Court issue a broad pronouncement addressing whether the procedures of Section 40C "for investigating complaints of discrimination" and "for determining the validity of claims of private club exemption" are unduly intrusive of the rights of a private nonexpressive association. Petition, p. i. Such a pronouncement, however, would be inappropriate in the context of this case, where the courts below engaged in extensive fact-finding about the precise characteristics of the individual plaintiff social clubs. Petitioners' Appendix, pp. 28-34, 48-59.

The Fifth Circuit's holding that the City failed to meet its burden of demonstrating how the means it has selected to enforce Chapter 40C are the least intrusive on the Club's and its members' right of private association addressed only three arguments raised by the City in its brief to the Fifth Circuit: (1) that Chapter 40C would not require highly public proceedings; (2) that the

City could not demand membership lists from the Clubs; and, (3) that liberal discovery in the federal court proceeding to which the Clubs subjected themselves equates with the powers the City possesses under Chapter 40C. Petitioners' Appendix, p. 35. Notably, the City's Petition does not contest the validity of the Fifth Circuit's express findings that (1) any investigation of the Clubs under Chapter 40C would require highly public proceedings; (2) Chapter 40C empowers the City to demand the production of membership lists from the Clubs and, in addition, to demand the production of club members' tax returns; and (3) proceedings undertaken pursuant to Chapter 40C are not governed by rules of evidence and civil procedure and are presided over by a hearing officer appointed by the Executive Director of the New Orleans Human Relations Commissioner. Petitioners' Appendix, pp. 36-40. Rather, the City here maintains that it is entitled to hold highly public hearings wherein the Pickwick Club's membership lists will be exposed and in which the hearing officer is entitled to examine, among other documents, the Club members' tax returns.

Indeed, the crux of the City's argument is that the palpable risk of public exposure of information about the Pickwick Club's private affairs does not substantially impair the Club's constitutional right of private association. Petition, pp. 9, 13. As noted above, however, the City has not contested the holdings of the courts below that the Pickwick Club is "entitled to the fullest protection of the first Amendment's right to privacy and freedom of intimate association." Petitioners' Appendix, p. 60. *Accord*, Petitioners' Appendix, pp. 33-34. The City's attempt to distinguish between "the right of a private social club to protection against public disclosure about its affairs" from "the right of private social association itself," Petition p. 14, is mere wordplay. As the District Court observed:

> Because of the[] intimate, family-like relationships among members, it is likely that members carry on activities at the Clubs in much the same way that they do at their homes. If the government can force Plaintiff members to publicly reveal these types of activities, then the First Amendment would have no utility. Clearly, the First Amendment provides individuals with definite and important rights, and exposing these private club members to revelation about these types of activities, along with members' tax returns and membership lists, violate the rights of these individuals not to have their private affairs made public by the government.

Petitioners' Appendix, p. 63 (citing *Whalen v. Roe*, 429 U.S. 580, 599 n.24 (1976)). The City's argument ignores that, by its very nature, privacy once destroyed may never be restored. Ultimately, the City's reasoning renders the First Amendment devoid of meaning.

Finally, the Fifth Circuit's opinion is consistent with prevailing jurisprudence addressing the right to privacy afforded by the First Amendment. This Court has identified a constitutionally protected "zone of privacy" that involves two kinds of interests: "[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 580, 599-600 (1976). As to the latter interest, "the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships." *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 544 (1987). The First Amendment protects those relationships that presuppose

"deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thought, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1983). This is so because the "freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Rotary Club*, 481 U.S. at 545.

The second interest protected by a club's constitutional "zone of privacy" is the interest in avoiding disclosure of personal matters. *Whalen v. Roe*, 429 U.S. 580, 599-600 (1976). This Court recognizes that one primary attribute of the constitutional right of privacy is "the right of an individual not to have his private affairs made public by the government." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). Indeed, "'the right to be let alone'" is "'the right most valued by civilized men.'" *Whalen*, 429 U.S. at 599 n.25 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

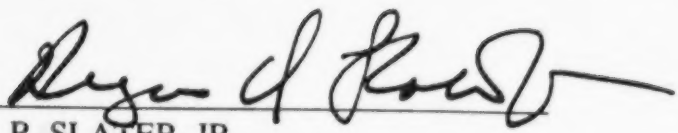
First Amendment freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government influence." *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963). Chapter 40C contemplates a public inquiry into confidential and sensitive matters, which would certainly infringe upon the Pickwick Club's privacy rights as protected by the First Amendment. The "[i]nviolability of privacy in group association may in many circumstances be indispensable to the preservation of freedom of association . . ." *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960). *See N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462 (1958) (disclosure of membership lists entails "the likelihood of a substantial restraint upon the exercise by [an organization's] members of their right to freedom of association.").

The First Amendment does not contain mere hollow words without meaning or effect. And the effect of the First Amendment in the instant case is to afford the Pickwick Club protection from the City's undue interference with its right of private association. In light of Chapter 40C's provision for highly public hearings requiring the revelation of sensitive private information such as the Pickwick Club's membership lists and the Club members' tax returns, the Fifth Circuit correctly held that the City's proposed investigation of the Pickwick Club, as well as other proceedings contemplated by Chapter 40C, threatens unduly the Club's right of private association. Petitioners' Appendix, p. 34.

CONCLUSION

Petitioners ask this Court to clarify "the balancing principles articulated by this Court in [] private/government interest conflicts." Petition, p. 16. Any such clarification undertaken by this Court, however, can have no effect on the Pickwick Club. The City remains permanently enjoined from applying the substance of Chapter 40C to the Club. Any ruling by this Court on the validity of investigatory provisions of Chapter 40C would constitute an advisory opinion because the City cannot investigate complaints of discrimination lodged against the Pickwick Club. As a constitutionally protected private club under the First Amendment, the Pickwick Club, under the terms of Chapter 40C itself, falls outside the scope of the ordinance. In sum, there exists between the parties no real or substantial controversy sufficient to provide this Court with jurisdiction under Article III, section 2, clause 1 of the United States Constitution.

Respectfully submitted:

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